Supreme Court, U. S.
FILED
FEB 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-452, 77-457, 77-551, 77-602

MOBIL ALASKA PIPELINE COMPANY, EXXON PIPELINE COMPANY, BP PIPELINES INC. AND ARCO PIPE LINE COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, *et. al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS THE STATE OF ALASKA AND THE ARCTIC SLOPE REGIONAL CORPORATION

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT	3
Background	4
Proceedings before the Commission	8
The Commission's Order	17
Proceedings in the Court of Appeals	22
SUMMARY OF ARGUMENT	25
ARGUMENT	30
I. THE COMMISSION HAD AUTHORITY UNDER SECTION 15(7) OF THE ACT TO SUSPEND THE CARRIERS' INITIAL RATES	31
A. The Legislative History of the Mann-Elkins Act is Fully Consistent with the Applicability of Section 15(7) to Initial Rates	34
B. The Suspension Provisions in Other Parts of the Interstate Commerce Act as well as in Other Regulatory Statutes Confirm the Commission's Power to Suspend Initial Rates Under Section 15(7)	40
C. The Commission's Interpretation of its Suspension Power as Applying to Initial Rates is Entitled to Great Weight	48
II. THE COMMISSION DID NOT PRESCRIBE RATES OR EXCEED ITS STATUTORY AUTHORITY BY ADVISING THE CARRIERS IN ADVANCE OF THE MAXIMUM RATES IT WOULD NOT SUSPEND PENDING INVESTIGATION	53

TABLE OF CONTENTS—Continued

	Page
III. THE COMMISSION HAD THE AUTHORITY TO CONDITION ITS ACCEPTANCE OF THE INTERIM RATES WITHOUT SUSPENSION UPON THE CARRIERS' AGREEMENT TO REFUND ANY CHARGES IN EXCESS OF THE RATES DETERMINED IN THE INVESTIGATION	58
IV. THE COMMISSION'S ORDER DID NOT CONTRAVENE ANY RIGHTS OF THE CARRIERS UNDER THE FIFTH AMENDMENT	64
CONCLUSION	66
STATUTORY APPENDIX	SA-1

TABLE OF AUTHORITIES

Cases:	Page
Admiral-Merchants Motor Freight, Inc. v. *United States*, 321 F. Supp. 353 (D. Colo.), *aff'd*, 404 U.S. 802 (1971)	61, 62
Algoma Coal & Coke Co. v. *United States*, 11 F. Supp. 487 (E.D. Va. 1935)	56
Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240 (1975)	4
Arrow Transportation Co. v. *Southern Railway Co.*, 372 U.S. 658 (1963)	30, 31, 35, 36, 37, 59, 60, 63
Atchison, Topeka & Santa Fe Railway Co. v. *Wichita Board of Trade*, 412 U.S. 800 (1973)	36
Atlantic Refining Co. v. *Public Service Commission of New York*, 360 U.S. 378 (1959)	47, 61
Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975)	31
Chemehuevi Tribe of Indians v. *FPC*, 420 U.S. 395 (1975)	48
Commissioner of Internal Revenue v. *Brown*, 380 U.S. 563 (1965)	32
Consolidated Edison Co. of New York, Inc. v. *FPC*, 512 F.2d 1332 (D.C. Cir. 1975)	57
Consolidated Truck Service, Inc. v. *United States*, 193 F. Supp. 773 (D.N.J. 1960)	30
FPC v. *Sunray DX Oil Co.*, 391 U.S. 9 (1968)	61
Flora v. *United States*, 357 U.S. 63 (1958)	31
Gabbert v. *Atchison, Topeka & Santa Fe Railway Co.*, 93 F.2d 562 (5th Cir. 1937)	63
Great Western Packers Express, Inc. v. *United States*, 246 F. Supp. 151 (D. Colo. 1965)	30
Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977)	63
Long Island Rail Road Co. v. *United States*, 193 F. Supp. 795 (E.D.N.Y. 1961)	30, 31
Louisville & Nashville Railroad Co. v. *Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925)	63
Mobil Oil Corp. v. *FPC*, 417 U.S. 283 (1974)	62
Moss v. *CAB*, 430 F.2d 891 (D.C. Cir. 1970)	57
Permian Basin Area Rate Cases, 390 U.S. 747 (1968)	65

TABLE OF AUTHORITIES—Continued

	Page
Pfizer, Inc. v. *Government of India*, 46 U.S.L.W. 4073 (U.S. January 11, 1978) (No. 76-749)	37
Port of New York Authority v. *United States*, 451 F.2d 783 (2d Cir. 1971)	55, 56
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969)	48
Southern Pacific Co. v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918)	63
Udall v. *Tallman*, 380 U.S. 1 (1965)	48
United Gas Improvement Co. v. *Callery Properties, Inc.*, 382 U.S. 223 (1965)	61
United States v. *Atlantic Refining Co.*, C.A. No. 14060 (D.D.C. 1941) (consent decree)	14
United States v. *American Trucking Associations*, 310 U.S. 534 (1940)	48
United States v. *Chesapeake & Ohio Railway Co.*, 426 U.S. 500 (1976)	29, 31, 33, 34, 35, 54, 55, 58, 59
United States v. *Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973)	30, 55
Wilderness Society v. *Morton*, 479 F.2d 842 (D.C. Cir. 1973) (en banc), *cert. denied*, 411 U.S. 917 (1973)	4

Administrative Decisions:

	Page
Animal Feed from Mississippi & Tennessee to Midwest & Southwest, 316 I.C.C. 94 (1962)	51
Bituminous Coal via Motor-Rail from Lynnville, Indiana to Chicago, Illinois, 313 I.C.C. 573 (1961)	50
Charge for Terminalling and Storage, Kenai Pipeline, I.C.C. Docket No. 36244 (July 20, 1976)	13
Clay from Greybull, Wyoming, to Points in Middle West, 314 I.C.C. 705 (1961)	51
Cotton from New Orleans, 49 I.C.C. 751 (1918)	48, 49
Discontinuance of Inland or Off-Track Stations in New York City, 173 I.C.C. 727 (1930)	52

TABLE OF AUTHORITIES—Continued

	Page
Foodstuffs & Agricultural Commodities, California & Arizona to West & South, 329 I.C.C. 321 (1966)	51
In re Western Union International, Inc., 28 F.C.C. 2d 727 (1971)	44, 48
In re Western Union International, Inc., 31 F.C.C. 2d 554 (1971)	45
In re Wharfage Charges of the Galveston Wharf Co., 23 I.C.C. 535 (1912)	51
Lumber-Western Auto Transports, Inc., 306 I.C.C. 623 (1959)	51
Machinery from Salt Lake City International Transport, Inc., 304 I.C.C. 286 (1958)	51
Maximum Rate Provision, Ocean-Rail to Southwest, 258 I.C.C. 63 (1944)	52
North Carolina Line—Rates To and From Charleston, South Carolina, 2 U.S. Mar. Comm'n 83 (1939)	45
Petroleum Products, Williams Brothers Pipe Line Co., 355 I.C.C. 479 (1976)	13
Puerto Rican Rates, 2 U.S. Mar. Comm'n 117 (1939)	45
Rail-Water, Grain in Bulk, Missouri, Illinois and Indiana to Buffalo, 321 I.C.C. 564 (1963)	49, 50
Reduced Pipeline Rates and Gathering Charges, 243 I.C.C. 115 (1940)	13
Restrictions in Routing in Connection with the Georgia & Florida Railroad between Greenwood, South Carolina & Augusta, Georgia, 165 I.C.C. 3 (1930), *aff'd sub nom. Atlantic Coast Line Railroad* v. *United States*, 48 F.2d 239 (W.D.S.C. 1931), *aff'd*, 284 U.S. 288 (1932)	52
Salt from Louisiana Mines to Chicago, Illinois, St. Louis, Missouri and Intermediate Mainline Points, 69 I.C.C. 312 (1922)	52
Soybean Meal & Salt from Iowa & Nebraska to Iowa, Nebraska, and South Dakota, 318 I.C.C. 99 (1962)	51

TABLE OF AUTHORITIES—Continued

Page

West Coast Bus Lines, Ltd., Common Carrier Application, 41 M.C.C. 269 (1942), *aff'd sub nom. North Coast Transportation Co.* v. *United States*, 54 F. Supp. 448 (N.D. Cal.), *aff'd in part and dismissed in part*, 323 U.S. 668 (1944) 47, 48
Wine from Canandaigua, New York to Florida, 316 I.C.C. 246 (1962) 51

Constitution and Statutes:

United States Constitution Amendment V 3, 24, 30, 64
Alaska Native Claims Settlement Act, 85 Stat. 688,

43 U.S.C. §§ 1601-1627 7
43 U.S.C. § 1605 8
43 U.S.C. § 1606 8
43 U.S.C. § 1608 8
43 U.S.C. § 1610 8
43 U.S.C. § 1611 8
43 U.S.C. § 1613 8

Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 3
Federal Aviation Act

Section 1002(g), 49 U.S.C. § 1482(g) 23, 46

Federal Communications Act

Section 204, 48 Stat. 1071, 47 U.S.C. § 204..... 44

Federal Power Act

Section 205(e), 16 U.S.C. § 824d(e) 46, 62

Hepburn Act of 1906, 34 Stat. 584 37
Intercoastal Shipping Act of 1933, 46 U.S.C. § 845.. 45

Interstate Commerce Act, 49 U.S.C. §§ 1 *et seq.*

Section 1, 49 U.S.C. § 1 2
Section 1(5), 49 U.S.C. § 1(5) 33

TABLE OF AUTHORITIES—Continued

Page

Section 6(1), 49 U.S.C. § 6(1)..... 9
Section 6(7), 49 U.S.C. § 6(7) 9
Section 8, 49 U.S.C. § 8 ..... 2, 63
Section 15(1), 49 U.S.C. § 15(1) 2, 18, 53, 56
Section 15(7), 49 U.S.C. § 15(7) 2, 17, 18, 23, 24, 25, 26, 27, 28, 29, 32, 34, 40, 43, 44, 46, 48, 49, 50, 51, 52, 53, 59, 62, 63, 64
Section 20(5), 49 U.S.C. § 20(5) 58
Section 20(7), 49 U.S.C. § 20(7) 58
Section 216(g), 49 U.S.C. § 316(g) ..2, 27, 28, 40, 41, 43, 44, 50, 51
Section 218(c), 49 U.S.C. § 318(c) 40, 41
Section 307(g), 49 U.S.C. § 907(g) 2, 41
Section 307(i), 49 U.S.C. § 907(i) 41
Section 406(e), 49 U.S.C. § 1006(e) 2, 41

Mann-Elkins Act of 1910, 36 Stat. 539 .....25, 26, 34, 39
Natural Gas Act

Section 4(d), 15 U.S.C. § 717c(d) 46
Section 4(e), 15 U.S.C. § 717c(e) 46, 62

Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, 87 Stat. 584, 43 U.S.C. §§ 1651 *et seq.*, 30 U.S.C. § 185(r) 4
Transportation Act of 1920, 41 Stat. 456 ..... 44, 59
Transportation Act of 1940, 54 Stat. 935 42

28 U.S.C. § 1254(1) 2
28 U.S.C. § 2350(a) 2
30 U.S.C. § 185(r)(1) 4
30 U.S.C. § 185(r)(5) 4
49 Stat. 558 40
49 Stat. 560 41
52 Stat. 1240 ..... 40, 41
54 Stat. 911 39
54 Stat. 939 42
56 Stat. 288..... 42

TABLE OF AUTHORITIES—Continued

	Page
Alaska Statutes:	
§ 43.55.011	7
§ 43.55.012	7
§ 43.55.013	7
§ 43.55.016	7
§ 43.55.017	7
§ 43.55.020	7
§ 43.55.030	7
§ 43.55.140	7
Regulations:	
49 C.F.R. § 1003.1 (1976)	47
49 C.F.R. § 1100.19 (1976)	19
49 C.F.R. § 1100.200 (1976)	9
49 C.F.R. § 1130.1 (1976)	47
42 Fed. Reg. 46267 (1977)	3
Legislative Materials:	
Hearings:	
Hearings on Bills Affecting Interstate Commerce Before the Committee on Interstate and Foreign Commerce of the H.R., 61st Cong., 2d Sess. (1910)	35, 36
Hearings on H.R. 4378, Before the House Committee on Interstate & Foreign Commerce, 66th Cong., 2d Sess. (1919)	60
Reports:	
S. Rep. No. 355, 61st Cong., 2d Sess. (1910)	34
S. Rep. No. 94-918, 94th Cong., 2d Sess. (1976)	45
H.R. Rep. No. 923, 61st Cong., 2d Sess. (1910)	35, 55
H. R. Rep. No. 456, 66th Cong., 1st Sess. (1919)	60
H.R. Rep. No. 650, 66th Cong., 2d Sess. (1920)	60, 61
H.R. Rep. No. 2714, 75th Cong., 3d Sess. (1938)	42
H.R. Rep. No. 1217, 76th Cong., 1st Sess. (1939)	42

TABLE OF AUTHORITIES—Continued

	Page
H.R. Rep. No. 2066, 78th Cong., 2d Sess. (1942)	27, 43
H.R. Rep. No. 94-1315, 94th Cong., 2d Sess. (1976)	45
Congressional Record:	
45 Cong. Rec. 3471 (1910)	38
45 Cong. Rec. 4711 (1910)	39
45 Cong. Rec. 5232 (1910)	39
45 Cong. Rec. 6409 (1910)	38
45 Cong. Rec. 6915 (1910)	38
58 Cong. Rec. 8317 (1919)	60
84 Cong. Rec. 9707 (1939)	42
119 Cong. Rec. 22797 (1973)	4
Miscellaneous:	
Emergency Petition of State of Alaska for Investigation, ICC Docket No. 36536 (March 8, 1977)	8
I.C.C. Annual Report (1908)	35
ICC Order, Docket Nos. 36536, 36537 (April 18, 1977)	8
K. Davis, Administrative Law Treatise § 28.16 (1970 Supp.)	31
Motion of Exxon Pipeline Company to Deny Emergency Petition of the State of Alaska for Investigation, ICC Docket No. 36536 (April 18, 1977)	8
Petition of State of Alaska for Amendment of Rule 57(e), ICC Docket No. 36537 (March 8, 1977)	8
Pre-Hearing Brief of the United States Department of Energy, FERC No. OR78-1 (December 30, 1977)	16
Spritzer, *Uses of the Summary Power to Suspend Rates: An Examination of Federal Regulatory Agency Practices,* 120 U. Pa. L. Rev. 39 (1971)	36, 55
Verified Statement of R. Gary, November 30, 1977, submitted in FERC No. OR78-1	5

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BRIEF FOR RESPONDENTS THE STATE OF ALASKA AND THE ARCTIC SLOPE REGIONAL CORPORATION

OPINIONS BELOW

The opinion of the court of appeals (746a) is reported at 557 F.2d 775. The order of the Interstate Commerce Commission (623a), Investigation and Suspension Docket No. 9164 (Rate Filings) and No. 36611 (Rules and Regulations), June 28, 1977, will be reported at 355 I.C.C. 80.

JURISDICTION

The judgment of the court of appeals (772a) was entered on July 29, 1977. A petition for rehearing by BP Pipelines Inc. was denied on September 8, 1977 (774a). The petitions for writs of certiorari were granted on November 28, 1977 (789a). The jurisdiction of this Court rests on 28 U.S.C. §§ 1254(1) and 2350(a).

STATUTES INVOLVED

The pertinent parts of sections 1, 8, 15(1), 15(7), 216(g), 307(g) and 406(e) of the Interstate Commerce Act, as amended, 49 U.S.C. §§ 1, 8, 15(1), 15(7), 316(g), 907(g), 1006(e) are set forth in the appendix to this brief.

QUESTIONS PRESENTED

1. Whether, upon a showing of probable unlawfulness of the rates, the Interstate Commerce Commission had the power under section 15(7) of the Interstate Commerce Act to suspend for seven months, pending investigation, initial rate schedules for the transportation of crude oil by pipeline.

2. Whether the Commission, by advising the carriers in its suspension order of the maximum rates it would accept without suspension and allowing them to file such interim rates to be effective during the suspension period, prescribed rates within the meaning of section 15(1) of the Act, which requires a full hearing.

3. Whether the Commission was empowered to condition its acceptance, without suspension, of a carrier's interim rate filing on the latter's agreement to refund any charges thereafter found, after a full hearing, to exceed just and reasonable rate levels.

4. Whether the Commission's suspension order, which was issued after consideration of extensive economic data and oral argument before the Commission, and allowed the carriers to file interim rates based on their own cost data and an above-standard rate of return, violated the carriers' rights under the due process and just compensation clauses of the Fifth Amendment.

STATEMENT

These cases involve the authority of the Interstate Commerce Commission to issue an order (623a) suspending for the seven-month statutory period, pending an investigation now under way, the initial rate schedules filed by the four petitioner-pipeline owners and four other pipeline owners [1] upon a showing of probable unlawfulness of their rates. The eight companies proposed to operate as common carriers of crude oil over the Trans-Alaska Pipeline System ("TAPS"), a 48-inch line extending some 800 miles from the Prudhoe Bay oil field on the Alaskan North Slope to a terminal in Valdez, Alaska, a line in which the companies own undivided interests. (136a-37a, 189a, 319a.) Oil-pipeline common carriers are subject to regulation under part I of the Interstate Commerce Act, 49 U.S.C. §§ 1-27.[2]

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[1] Three of the other four pipeline owners, Amerada Hess Pipeline Corp., Sohio Pipe Line Co. and Union Alaska Pipeline Co., intervened in the court below and are parties here. The fourth, Phillips Alaska Pipeline Corp., which is not a party here, challenged the Commission's action in the District of Columbia Circuit. *See* Pet. Br. 4 & n.2.

[2] As of October 1, 1977, jurisdiction under the Interstate Commerce Act over the transportation of oil by pipeline was transferred from the Interstate Commerce Commission to the Federal Energy Regulatory Commission ("FERC"). (Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565, enacted August 4, 1977; Executive Order 12009, 42 Fed. Reg. 46267 (1977).) The full investigation of TAPS rates ordered by the ICC is continuing before FERC.

Background

The construction of TAPS followed the discovery in 1968 of the main Prudhoe Bay field, which contains over 9 billion barrels of recoverable petroleum, as well as much recoverable natural gas.[3] The Prudhoe Bay field was described by the Federal Power Commission in 1977 as containing "the largest accumulation of oil and gas ever discovered on the North American Continent." (136a.) It is estimated by the U.S. Geological Survey that the undiscovered recoverable resources of North Alaska include about 20 billion barrels of oil. (40a.)

Following a period of litigation involving environmental issues,[4] which was ultimately resolved by an act of Congress,[5] construction of TAPS began in April 1974 and was completed in June 1977.[6] Its design capacity is 1.2 million barrels per day (and is expandable to 2 million barrels). (147a, 189a.) The owners initially forecast a construction cost for TAPS of just under $1 billion. (10a, 86a, 117a, 140a.) As it turned out, according to data submitted by them to the Commission, the final aggregate cost to the eight pipeline companies was approximately $9.27 billion, consisting of nearly $8 billion in capital expenditures and well over $1 billion in capitalized construction interest and overhead costs. (10a, 86a, 140a, 187a-88a, 640a.)

[3] The pipeline companies advised the Commission that they are using the figure of 9.5-9.7 billion barrels of known recoverable oil reserves. (39a.)

[4] *See, e.g., Wilderness Soc'y* v. *Morton*, 479 F.2d 842 (D.C. Cir. 1973) (en banc), *cert. denied*, 411 U.S. 917 (1973); *Alyeska Pipeline Service Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975).

[5] Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651 *et seq.*, 30 U.S.C. § 185(r), Pub. L. No. 93-153, 87 Stat. 584, enacted November 16, 1973. The Act required that TAPS, like other pipelines constructed across federal lands, "be constructed, operated, and maintained as [a] common carrier," (30 U.S.C. § 185(r)(1)), and it authorized the Secretary of the Interior, whenever he has reason to believe that a pipeline owner or operator is not operating in accord with "its obligations as a common carrier," to "request the Attorney General to prosecute an appropriate proceeding before the Interstate Commerce Commission or Federal Power Commission. . . ." (30 U.S.C. § 185(r)(5)). *See also* 119 Cong. Rec. 22797 (1973) (remarks of Senator Jackson).

[6] The owners acted through their joint agent, Alyeska Pipeline Service Company, which will also operate the pipeline. (136a.)

The size of the ownership interests in the pipeline held by the eight companies varies widely—from Sohio Pipe Line's 33.34 percent interest to the 1.50 percent held by Amerada Hess Pipeline (*see* table, p. 6, *infra*). (749a.) Sohio Pipe Line and BP Pipelines (15.84%) are affiliated by virtue of a 1970 merger agreement involving their parent companies (*see* n. 7 in the margin).

Each of the pipeline owners (except for Union Alaska) is affiliated with an oil company that is a major producer in the Prudhoe Bay field,[7] and there exists a substantial identity of interest between pipeline ownership and ownership of the oil production from the field. Pipeline-

[7] Although petitioners deny here that petitioner BP Pipelines is "directly affiliated" with any company engaged in production of North Slope Oil (Pet. Br. 5), the verified statement of their consultant, R. Gary, which they have lodged with the Clerk (Pet. Br. 6 n.6), states:

> British Petroleum is an affiliate of The Standard Oil Company (Ohio) ("Sohio"), having merged its United States holdings, including its Prudhoe Bay leases, into Sohio in 1970 in exchange for an approximate 25% common stock interest in Sohio, which is rising to a maximum of approximately 54% as Sohio's Prudhoe Bay oil production increases. British Petroleum also retains a net profits interest in Sohio's net Prudhoe Bay oil production above 600,000 barrels per day and owns other North Slope leases not contributed to Sohio in the merger transaction. . . . [T]he parent companies of BP Pipelines and Sohio Pipe Line entered into an agreement in mid-1974 providing that BP Pipelines would acquire a 15.84% undivided interest in TAPS from Sohio Pipe Line in order to facilitate the financing of the System. [Verified Statement at 11-12.]

ownership and present field-ownership interests are as follows:[8]

Company	Percentage of Pipeline Ownership	Percentage of Production Ownership
Sohio Pipe Line Co./ Standard Oil Co. of Ohio [an affiliate of British Petroleum]	33.34%	53.16%
BP Pipelines Inc.	15.84	—
ARCO Pipeline/Atlantic Richfield Co.	21.00	20.27
Exxon Pipeline/Exxon Corp.	20.00	20.27
Mobil Alaska Pipeline/ Mobil Oil Corp.	5.00	2.09
Phillips Alaska Pipeline/ Phillips Petroleum Co.	1.66	2.05
Amerada Hess Pipeline/ Amerada Hess Corp.	1.50	0.54
Union Alaska Pipeline	1.66	—
Other Producers	—	1.62
	100.00%	100.00%

As a consequence of this identity of interest, any excess charges paid by the oil companies, as shippers, for transportation of their oil via TAPS are received for the most part by their own pipeline-company affiliates.

The level of TAPS rates has a direct and substantial economic impact on respondents the State of Alaska and the Arctic Slope Regional Corporation ("Arctic Slope").[9] The State of Alaska under its leases owns a one-eighth

[8] 749a; Pet. Br. 6 n.6 (adjusted to exclude the State of Alaska's royalty interest).

[9] These respondents are hereinafter collectively referred to as "the Alaska parties."

royalty interest in the Prudhoe Bay oil and is thus entitled to 12½ percent of the value of the oil where it enters the pipeline ("wellhead value"). (749a. *See* Pet. Br. 7 n.8.) Since the wellhead value is in substance the market price less the cost of transportation, there is an inverse relationship between wellhead value and the cost of TAPS transportation—*i.e.*, the lower the pipeline charges, the higher the wellhead value of the oil. (554a, 749a. *See* Pet. Br. 7 n.8.) In addition, the State has enacted a severance tax of 12¼ percent based on wellhead value.[10] Taken together, the State's royalty and maximum severance-tax interest amounts to 23.2 percent of wellhead value. Because of the inverse relationship between transportation costs and wellhead value, each dollar by which the TAPS rate exceeds a just and reasonable level results in the unjustified loss of about 23 cents to the State of Alaska.[11]

Arctic Slope is one of thirteen regional corporations established pursuant to the Alaska Native Claims Settlement Act ("ANCSA")[12] to administer assets received by Alaskan Natives in return for extinguishment of their aboriginal land claims, including the Arctic Slope Eskimos' claim to Prudhoe Bay.[13] As compensation for

[10] Alaska Statutes, §§ 43.55.011, .012, .013, .016, .017, .020, .030, .140 (effective July 1, 1977). *See* 749a. The severance tax of 12.25% is not applied to the 12.5% royalty interest held by the State of Alaska, thus giving the State a maximum severance-tax interest of 10.72% of wellhead value.

[11] At an assumed throughput of 1.2 million barrels per day, the State would lose about $1 million annually for each *penny* that the TAPS rate exceeds a just and reasonable level.

[12] 43 U.S.C. §§ 1601-1627, 85 Stat. 688 (1971).

[13] Prior to the enactment of ANCSA in 1971, the Inupiat Eskimos had claims of unextinguished aboriginal title based on use and occupancy since time immemorial to the entire Arctic Slope of the State of Alaska. Other Native people of Alaska (Eskimos, Aleuts, and Indians) had similar and substantial claims to other areas of the State. (112a-13a; 728a-31a.)

extinguishment of these claims, the Alaskan Natives received fee title to approximately 40 million acres of land plus a cash settlement of $962.5 million to be paid over a period of years. Of this amount, $462.5 million will be paid by the United States from appropriated funds. The remaining $500 million is to be paid from revenues derived from a 2 percent royalty on the wellhead value of all crude oil production in Alaska.[14] Arctic Slope and the other regional corporations receive 2 percentage points out of the State's 12½ percent royalty interest. (112a-16a, 728a-31a.)[15]

Proceedings before the Commission

Initial tariffs were filed by the eight TAPS carriers between May 27 and June 20, 1977,[16] to take effect be-

[14] 43 U.S.C. §§ 1605, 1606, 1608, 1610, 1611, 1613.

[15] As the owner or prospective owner of 5 million acres of potential oil-producing lands on Alaska's North Slope, the value of Arctic Slope's lands for oil development will also be affected by the level of TAPS rates. (115a.)

[16] Several months earlier the State of Alaska had asked the Commission to commence an investigation of TAPS rates in advance of the filing of initial tariffs, citing "the magnitude of the task and the shortness of time." (Emergency Petition of the State of Alaska for Investigation, ICC Docket No. 36536, March 8, 1977, p. 1. *See also* Petition of State of Alaska for Amendment of Rule 57(e), ICC Docket No. 36537, March 8, 1977.) The pipeline companies opposed this request as inconsistent with the statutory plan. Petitioner Exxon stated:

> When an *initial* tariff schedule for a newly constructed pipeline is filed, interested parties are given an opportunity to protest and petition the Commission for an investigation into *and/or a suspension* of the rates contained therein. 49 U.S.C. §§ 13(1), 15(7); 49 C.F.R. § 1100.42. In addition, the Commission may investigate *and/or suspend* the rate contained in an *initial* tariff schedule on its own motion. 49 U.S.C. §§ 13(2), 15(7). [Motion of Exxon Pipeline Company to Deny Emergency Petition of the State of Alaska for Investigation, ICC Docket No. 36536, March 28, 1977, p. 5 (emphasis added).]

The Commission denied the State's request as "premature." (ICC Order, Docket Nos. 36536, 36537, April 18, 1977.)

tween June 20 and July 1.[17] The proposed rates per barrel for transportation via TAPS were as follows 624a, 644a):

Amerada Hess	$6.44
ARCO	6.04
BP	6.35
Exxon	6.27
Mobil Alaska	6.31
Phillips Alaska	6.22
Sohio	6.16
Union Alaska	6.09
Composite Rate	$6.21

In a notice issued on June 2, 1977, the Commission requested each of the carriers "to submit a computation of the elements making up the determination of its proposed rate level immediately or as soon as possible, without waiting for the filing of protests to its tariffs." (1a.) A subsequent notice announced that, "[i]n view of the importance of the matter," the Commission would hear oral argument in the case on June 27. (2a.)[18] On June 15, protests and petitions for suspension were filed by both of the Alaska parties, the Department of Justice, and the Commission's Bureau of Investigations and Enforcement. (4a, 88a, 110a, 133a.)

[17] The filing of tariffs showing rates, fares and charges is required of oil-pipeline common carriers under sections 6(1) and (7) of the Act, 49 U.S.C. §§ 6(1), (7). Phillips Alaska filed its tariff on June 20, only 10 days prior to effectiveness and, at the Commission's request, extended the effective date until July 20. As a result, its tariff was dealt with in a separate Commission order, not the order under review. (*See* 749a.)

[18] This notice also reflected a decision by the Commission members to hear the case directly, rather than referring it to the staff suspension board and its appellate division of three Commissioners, as is routinely done in suspension cases. *See* 49 C.F.R. § 1100.200 (1976). (*See* 749a.)

The State of Alaska's protest (4a-87a) stated that the proposed rates—which would provide the carriers an estimated $2.7 billion in annual revenues (5a)—were unreasonably high.[19] The State cited the existence of substantial evidence that "[t]he TAPS construction project has been plagued by monumental cost overruns,"[20] but nonetheless assumed in its protest that the costs claimed by the carriers would be allowed in the suspension determination. (8a-12a.) The State presented data, however, challenging some of the assumptions and methods employed by the carriers, including their assumption in computing depreciation and amortization expense of only a 25-year life for the pipeline.[21] (12a-15a, 38a-44a.) In any case, the total of all claimed expenses incurred by the TAPS owners, the State showed, was only about $3.44 per barrel; and the difference between that figure and the composite proposed rate of about $6.20 was equity profit. (15a-18a.) Such excessive rates would not only "deter development of energy resources by producers other than the TAPS owners," but also "discourage maximum efficient use of the line even by owner-shippers and thus

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[19] The State's filing included a detailed "[p]reliminary analysis" of the tariffs prepared by an economic consultant. (54a-82a.)

[20] A voluminous report directed to this issue prepared for the Alaska Pipeline Commission was submitted with the protest. (*See* 9a, 83a-87a.) The Interstate Commerce Commission was also conducting its own independent audit of TAPS construction costs, having awarded a contract for this purpose to Touche Ross & Co. in October 1976. (8a, 138a.)

[21] That assumption, the State argued, was premised entirely on the main Prudhoe Bay field and failed to take account of other known oil pools in this field, as well as the sizable evidence that vast quantities of undiscovered recoverable oil exist in North Alaska (p. 4, *supra*). (38a-44a.) It further contended that "[t]he Commission's normal practice is to generally allow oil pipeline service lives of 35 years for crude oil trunk lines." (38a.)

The State also challenged the amounts of the carriers' claims for interest during construction, operating expenses other than depreciation and amortization, and interest expense. (12a-15a.)

would inhibit development of the oil resources in Alaska." (20a-21a.) The State urged the Commission to suspend the carriers' rates and to permit the filing of "maximum interim rates" (subject to a refund condition) of $3.59 to $4.42 per barrel. (5a-6a.)

Arctic Slope in its complaint (110a-32a) asserted that the capital expenditures claimed by the carriers may be attributable to "mismanagement and waste." (117a.) It also challenged a number of "erroneous factors and methods" employed by the carriers in their computations which, it argued, resulted in excessively high rates.[22] (112a, 118a-122a.) Such rates, by "drastically reduc[ing]" the wellhead price on which its royalties are payable, "would, in effect, postpone payment and thereby reduce the value of $500 million that Congress has determined to be owing to the [Alaskan] Natives."[23] (111a.) Also, the reduced wellhead price "would establish an entry barrier" to the development of other Alaskan oil reserves by other production companies, thereby "effectively negat[ing] the value of several million acres of Arctic Slope lands that Congress granted to Arctic Slope Eskimos in exchange for the Prudhoe Bay oil reserves. . . ." (11a-12a.) Arctic Slope urged the Commission to suspend the proposed rates and to permit the carriers to file substantially lower rates (between $3.04 and $3.44)

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[22] Arctic Slope pointed out that the 25-year life used to compute amortization of removal and restoration expense and also depreciation was too short; that the throughput assumptions were too low; that the substantial amount of capital generated by non-cash deductions was not considered; and that "[t]he use of reproduction costs for valuation is virtually unique to the Commission and results in pipeline companies realizing rates of return which significantly exceed rates permitted other public utilities." (119a-21a.)

[23] Arctic Slope estimated that at a $6.15 per barrel TAPS rate it would take 14 years before this sum would be repaid; at a rate $2 lower the repayment period would be only 9 years. (130a-32a.) The present value of the Alaskan Natives' royalty interest would be $45 million less at the higher tariff rate than at the lower. (130a.)

pending a final determination of the lawful rates. (123a-26a.)[24]

The protest filed by the Department of Justice (88a-109a) calculated that the proposed rates would result in overcharges of $700-$900 million annually. (95a.) "Unreasonably high transportation rates," the Department stated, "discourage exploration and development of new fields by reducing the wellhead value of crude, thereby decreasing returns on production. It would be inconsistent with national energy policy to permit rates to go into effect, such as those proposed by the carriers, which would unnecessarily impair the discovery and exploration of new sources of crude oil." (95a.)

The final protest was filed by the Commission's Bureau of Investigations and Enforcement (133a-215a), which viewed the proposed rates as "prima facie unreasonable." (143a.) Like the Alaska parties, the Bureau cited the "enormous cost overruns connected with the construction of TAPS [which] in themselves require the entry of an order of investigation" and urged that "no rate should receive even the tacit approval of this Commission until it has thoroughly considered the full record regarding the cost overruns."[25] (138a-41a.) The Bureau supported the position of the Alaska parties that the 25-year life for the pipeline assumed by the carriers in computing depre-

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[24] In urging suspension, Arctic Slope pointed out that "[t]he principal reason to favor the carrier in an ordinary suspension proceeding is the carrier's inability, retroactively, to recover upward adjustments from the shipper. However, in these proceedings, if the final tariff were to be adjudicated at a higher rate than the initial tariff, most of any profits lost by the companies from their pipeline operations would be recouped by their production operations." (124a.)

[25] In this connection, the Bureau discussed the Touche Ross audit of TAPS construction costs (n.20, p. 10, *supra*) and stated that the auditor's work was "being frustrated and delayed" by the pipeline companies. (141a-43a.)

ciation expense and removal and restoration costs was too short, pointing out that various independent studies of TAPS projected a substantially longer life. (152a-55a.) It concluded that suspension of the proposed rates was required and that pending investigation the carriers should be allowed to file (subject to a refund condition) "proper rates," which the Bureau computed at $4.54 to $5.00. (143a, 151a-52a, 161a-64a.)

One major rate issue, which was emphasized in several of the protests and became the focus of subsequent argument before the Commission, involved the carriers' treatment of interest expense in constructing their proposed rates. According to the carrier data submitted, the aggregate debt/equity ratio in financing TAPS was approximately 85%/15%. (23a-24a, 159a, 640a.) In calculating their rates, the carriers deducted interest expense in the computation of net income (*i.e.*, treating it as an "above-the-line" item) and then added a return element sufficient to provide them with a 7 percent return on total investment (*i.e.*, both the portion of the investment represented by equity and the portion represented by debt). (632a; p. 14, *infra*. *See, e.g.*, 334a-35a). This "double-dipping" procedure, the protestants showed, not only resulted in unreasonably high returns on equity but was also contrary to the Commission's past practice in oil-pipeline ratemaking, which treated interest as an element to be recovered in the return only. (26a, 29a-30a, 118a-19a, 155a-61a.)[26]

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[26] *See Reduced Pipeline Rates and Gathering Charges*, 243 I.C.C. 115, 148 (1940) and the ICC Bureau's explanation at 157a-58a; *Petroleum Products, Williams Brothers Pipe Line Co.*, 355 I.C.C. 479, 491 (1976); Initial Decision, *Charge for Terminalling and Storage, Kenai Pipeline*, ICC Docket No. 36244, served July 20, 1976, p. 4 ("[I]nterest should not be included as an expense item for the purpose of the present proceeding. However, the rate of return is expected to cover serving of debt.")

On June 22 the pipeline companies filed extensive responses to the protests. (251a-537a, 545a-77a.) They did not oppose an investigation of their rates (*e.g.*, 322a, 401a), but challenged the Commission's authority as a matter of law to grant the suspension relief requested in the protests and argued that the proposed rates were both reasonable and computed in accordance with accepted practice.[27]

On June 27 the nine-member Commission heard a full day of oral argument. (App. (Vol. III), Exs. 1-3.) In addition to issues of law, much of the argument related to the appropriate treatment of interest expense. The carriers' methodology, it became clear, was premised on a 1941 consent decree in a proceeding brought by the Department of Justice under the Elkins Act:[28]

> Commissioner O'Neal: You are seeking 7 percent on the total valuation plus interest?
>
> Mr. Jordan [counsel for the carriers]: Well, we're seeking 7 percent return on valuation and before we calculate what that return is—what the net income figure is—we have taken out interest as an expense element. Just along with operating expenses and other forms of expenses, we have taken interest on debt.
>
> We tune to that 7 percent figure in the consent decree and that is our understanding of the methodology. [App. (Vol. III), Ex. 1, pp. 177-78.]

[27] The responses of petitioners Exxon and Sohio made clear that if interest is excluded as an above-the-line expense (as protestants showed was the Commission's practice), their return on total valuation under the proposed rates would be 12.25 and 12.9 percent, respectively (357a, 566a)—which far exceeds the 8 percent return on valuation that the Commission has permitted in prior cases involving crude oil pipelines (*see* 633a).

[28] *United States* v. *Atlantic Ref. Co.*, C.A. No. 14060 (D.D.C. 1941). This decree placed a limitation of 7 percent of valuation on the dividends which oil company-owned pipelines could pay to their shipper-owners without such payments constituting unlawful rebates. (625a, 632a-33a.)

Although the carriers argued (as they did in their responses) that this treatment of interest expense was the same as that employed by the Commission when it transmitted certain oil-pipeline data to the Congress (*e.g.*, *id.* at 14-15), counsel for the ICC Bureau showed that the data in question was simply transmitted in alternative formats—"In Schedule A interest expense is not deducted from net income. In Schedule B interest expense is deducted from net income"—and that "in every contested case that has been before this Commission" interest has been recovered in the return on valuation only. (*Id.* at 204-05, and Ex. 2 at Ex. 8; *see* n.26, p. 13, *supra.*)

The oral argument also dealt with the equities involved in the Commission's determination whether or not to suspend. In this regard, the Alaska parties pointed out that they would not be made whole by either a refund condition (which the carriers had agreed to accept if the Commission did not suspend) or reparations. They cited the irreparable injury resulting from delay in the receipt of funds needed for the State's ongoing budget and program obligations, including postponement of programs involving secondary education and rebuilding of fisheries for Alaskan Natives, and also from delaying the programs for which the Alaskan Natives' cash settlement would be used. (*Id.* at 139-44, 193, 200-01.)[29] The Department of

[29] As counsel for Arctic Slope stated without contradiction (App. (Vol. III), Ex. 1, pp. 140, 143-44, 200-01):

> Now, right now, under court order, the state of Alaska is obligated to some $60 million to provide secondary education for Alaskan natives.
>
> There is another $50- to $100- to $120 million—which the state is obligated to put into rebuilding the fisheries which, by federal law, were a part of the resources of the native people until very recently.
>
> * * *
>
> The time for the action in Alaska is now. The native corporations are struggling to establish themselves right now to develop their resources, provide basic education and that type of thing

Justice stated that "the United States, the people of the United States, would be hurt, because for as long as those high, inefficient, excessive tariffs are in effect, development of other oil resources on the north slope would be delayed. . . . And there is no way of refunding time." (*Id.* at 122.)[30] Also, the ICC's Bureau pointed out that the effect of a suspension order on the oil company-pipeline

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for their people today, and a three- or four-year deferral simply—with inflation and the other things, the cost of living and development in Alaska such as they are—a many-year deferral with a refund provision at the end of that time is not going to make it whole.

Children who go for three or four years without a high school in their town and who have to spend nine months of the year in another city will not be compensated by a refund provision that gives them a high school four or five years from now.

* * *

The incredible impact on the State of Alaska's budget will be felt immediately and irreparably by Alaska natives. The schools and the restoration of the fisheries, which the State of Alaska is legally obligated to pay for and provide to Alaska natives, will obviously not happen if Alaska is waiting for some time in the future for a refund. [Emphasis added.]

[30] The Department of Justice's position is noteworthy in light of Mr. Justice Brennan's expressed concern, in his dissent from the Court's stay of the Commission's suspension order, as to the impact of a stay upon the "ultimate consumers of oil" shipped via TAPS. (787a.) While it is convenient for purposes of discussion here to view the domestic U.S. market price as a constant (*see* Pet. Br. 8 & n.9), the interests of American consumers may nonetheless be affected by the suspension *vel non* of the carriers' rates. As the Department of Justice suggested, unreasonably high TAPS rates, even over a period of months, may discourage or delay development of Alaskan oil reserves—which, as this record shows (39a-41a, 136a), may well be large enough to have a substantial impact upon domestic U.S. oil prices. In addition, the Department of Energy stated in a recent filing in the ongoing investigation of TAPS rates before FERC that "the national economic interest and the national energy policy to reduce reliance on imported oil militate in favor of the minimum tariffs consistent with the costs and risks prudently incurred by the pipeline owners." (Pre-Hearing Brief of the United States Department of Energy, FERC No. OR78-1, December 30, 1977, p. 9.)

company enterprises would in large measure simply be "moving money from one pocket to the other." (*Id.* at 162.)[31]

The Commission's Order

On June 28, 1977, the Commission, by a unanimous vote, issued the order under review (623a), which instituted a formal investigation of the proposed TAPS rates and suspended those rates for the seven-month statutory period, pursuant to section 15(7) of the Act. The Commission also authorized the carriers to file (if they so chose), on one day's notice, interim rates not to exceed specified levels for effectiveness during the suspension period (subject to a refund condition).

In deciding to institute an investigation, the Commission noted that the carriers "do not object to a formal investigation of the filed rates" and found that the pro-

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[31] Both the ICC Bureau and the Department of Justice responded to a comment directed to the Commission by counsel for Sohio Pipe Line that "if this pipeline is stopped, you're going to have an 800-mile cannon" (*id.* at 80)—in other words, that the carriers might not operate the pipeline if their proposed rates were suspended. Counsel for the Bureau discussed, in answer to a Commissioner's question, possible federal-court injunctive remedies in such an event. (*Id.* at 145-47.) And counsel for the Department of Justice stated that "an *agreement* on the part of these owners not to use the line, in order to coerce the Commission into granting them higher rates or perhaps coerce Congress into . . . taking jurisdiction away from the Commission" could have "antitrust consequences." (*Id.* at 121 (emphasis added).) He added that the Department "would not take any action unless the anti-trust division was convinced that, in fact, an illegal conspiracy, which was not the subject of any defenses, had been committed." (*Id.*)

From this, petitioners repeatedly imply that they were compelled to adopt the suggested interim rates under threat of "criminal prosecution" (Pet. Br. 8-9, 41). Such an implication is wholly unfounded.

testants had made "a sufficient showing of probable unlawfulness" to warrant an investigation. (625a-26a.)[32]

With respect to suspension, the Commission rejected the contention of some of the carriers that it lacked authority to suspend initial rates.[33] It relied for this view upon the language of section 15(7), Commission precedent, and similar suspension provisions under the Act pertaining to other modes of carriage which include "'grandfather' language making the provisions inapplicable to 'initial' rates filed on or before a certain date." (626a-27a.) "By implication, then," the Commission stated, "the investigation and suspension provisions *are* applicable to initial rates filed after such date." (627a (emphasis in the original).) The Commission also decided as a matter of discretion that it should not withhold suspension relief, citing the protestants' claim that a refund remedy would not afford "adequate protection." (627a.) The Commission concluded: "Although we recognize that the refund remedy is available, we do not believe that the rates can be allowed to go into effect without suspension, when, as here, the protestants have made a showing of probable unlawfulness." (*Id.*)

The Commission also held that it was empowered to allow the carriers to file specified interim rates during the suspension period and that such action, contrary to the carriers' view, would not constitute rate prescription within the meaning of section 15(1) of the Act, which requires a full hearing. "These interim rates," it stated, "would not be intended to have permanent effect, but would merely be interim rates that we would allow to be collected during the suspension period." (628a.) Further,

[32] The investigation was instituted pursuant to sections 15(1) and 15(7) of the Act and encompasses both suspended and interim rates. (637a.)

[33] With regard to the position of petitioner Exxon on this issue, *see* n.16, p. 8, *supra*.

"[s]uch rates, if filed, would remain subject to Commission scrutiny. . . ." (*Id.*) The Commission added (629a):

> We believe that the power to allow interim rates is inherent in the suspension power. Without it, the Commission could be faced with the choice of allowing the carriers to operate at any rate they choose, whether or not lawful, or precluding carrier operations altogether. We do not believe that Congress could have intended our powers to be so inflexible. If the suspension power did not include the discretion to permit interim rates, it would be a substantially less satisfactory tool for serving the public interest.

In determining the level of the interim rates that it would allow the carriers to file, the Commission accepted the "basic data" supplied by the carriers and (with one exception favorable to the carriers) applied existing Commission ratemaking standards for crude oil pipelines.[34] (630a. *See* 632a-35a.) Thus, although it believed that "substantial questions have been raised" by the protestants, particularly with regard to depreciation expense and removal charges, the Commission deferred those issues for consideration in the formal investigation. (630a-31a.) The "excessive construction costs" alleged by the protestants were likewise found not to be "a matter that can be properly dealt with at the present stage of the proceeding." (631a-32a.)

[34] Petitioners now assert that their data was "supplied informally" and that the Commission "took no evidence." (Pet. Br. 9, 10, 36.) But the Commission had requested the carriers to supply data showing how their proposed rates were computed—rates under which they would collect $2.7 billion annually—and was surely entitled to utilize their submissions. (*See* 218a-50a, 640a-43a.) And whether or not the carriers' data and that submitted by the protestants would be deemed "evidence" in a subsequent formal investigation (*see* 49 C.F.R. § 1100.19 (1976)), the Commission, in fact, received voluminous economic data upon which its suspension determination was based.

Only the carriers' treatment of interest expense—the "double-dipping" issue—was rejected by the Commission, which emphasized that the consent decree standard used by the carriers "has never been employed in a Commission proceeding as the test of reasonableness of rates." (632a-33a.) The Commission stated (633a):

> Its [the consent decree's] sole legal status is as a limit on the amount of dividends that pipelines may pay to shipper owners without risking prosecution under the Elkins Act for illegal rebates. Moreover, as a standard of reasonableness, it has nothing to recommend it from a conceptual standpoint. Although valuation is a measure of the entire investment, the consent decree standard allows a return on valuation to be used entirely to compensate one segment of the capital invested. Such a standard can have no relationship, except by coincidence, to the carriers' true capital costs. *As shown in Appendix 3, the filed rates would produce returns on equity ranging from 31 percent to 96 percent.* Accordingly, it can be seen that the tariff rates would produce returns exceeding capital costs, even where the carriers' own expense and investment data are accepted. [Emphasis added.]

The carriers' composite return on equity under their proposed rates, as shown by the Commission's appendix, would be 46.0 percent, and their rates of return on valuation would range from 12.4 to 13.5 percent. (644a.)

The Commission nonetheless declined to utilize an 8 percent return on valuation, which it had determined in prior cases to be the standard for crude oil pipelines. (633a-35a.) An 8 percent return on valuation in this case, it found, would produce insufficient returns on equity. The Commission determined instead to utilize "for present purposes" a 10 percent return on valuation—a standard that it had previously used for "petroleum

products" pipelines. (634a-35a.) The interim rates thus computed by the Commission using this latter standard are as follows (638a-46a):

Amerada Hess	$4.85
ARCO	4.91
BP	4.68
Exxon	5.10
Mobil	4.84
Sohio	4.70
Union Alaska	4.89
Composite Rate	$4.84 [35]

The returns on equity under these rates range from 13.3 to 54.3 percent,[36] and the composite return on equity is 23.0 percent. (635a, 646a.)[37]

Finally, the Commission required as a condition of its acceptance of the carriers' interim rate filings that they "keep account of the amounts collected under the interim rates or the proposed rates should they become effective"

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[35] This rate is $1.37 or 22 percent below the $6.21 composite rate proposed by the carriers (*see* 644a). Although the composite interim rate figure, which is derived from the Commission's appendix, included Phillips Alaska, the June 28 order under review did not in terms apply to Phillips (*see* n.17, p. 9, *supra*). A suspension order as to Phillips was entered on July 18, 1977, and the interim rate that it was allowed to file is $4.87 per barrel.

[36] There is "no figure for Mobil which claims to be totally debt financed." (635a.)

[37] With respect to the carriers' argument that the "abnormally high proportion of debt in their capital structures . . . is made possible by the fact that their debt obligations are unconditionally guaranteed by their parent oil companies" and that "rates based on 10 percent return on valuation provide a much lower return on equity with a more normal capital structure," the Commission stated that this rate of return "appears suitable for present purposes," emphasizing that its use here would not constitute a "prejudgment" of the issue either in the formal investigation or in an independent Commission rulemaking proceeding which encompasses oil-pipeline rate of return issues. (*Id.*)

and "agree to refund any portion of such amounts that may ultimately be established as excessive." (636a.) This condition was imposed, the Commission said, because "[w]e recognize that even the lower interim rate levels may prove upon investigation to exceed reasonable levels." (*Id.*)[38]

Proceedings in the Court of Appeals

Commencing July 6, 1977, each of the petitioners sought review in the Fifth Circuit of the Commission's suspension order, together with injunctive or stay relief. The Alaska parties intervened on the side of the federal-government respondents, who moved to dismiss on the ground that suspension orders of the Commission are not reviewable in the courts. (718a, 726a.) On July 29, after hearing oral argument, the court of appeals (Brown, C.J. and Godbold, J.), with one judge (Roney, J.) dissenting, found that the Commission had acted within its statutory authority and, having so found, dismissed the petitions for review.[39] (746a-61a.)

Addressing the jurisdictional issue, the court of appeals held that "the rule of unreviewability" of ICC suspension orders "presupposes an affirmative answer to a

[38] The carriers filed petitions for reconsideration seeking upward modification of the interim rates, principally on the ground that the 1.2 million barrels per day throughput assumed by the Commission in its order was too high for the seven-month suspension period and, accordingly, that their per barrel costs would be higher than assumed. (578a. *See* 775a, 782a.) The Commission, on September 27, 1977, denied the carriers' petitions, pointing out that "1.2 million barrels is the amount that they reported to the Commission as their expected normal daily throughput. . . ." (775a-76a.) The Commission also denied a petition for reconsideration in part filed by the State of Alaska, which challenged, *inter alia*, the Commission's treatment of taxes, which it computed on an imputed or "normalized" basis when the actual taxes incurred by the carriers will be substantially less. (779a-80a, 782a.)

[39] The court also denied all injunctive and stay relief sought by the petitioners. (761a.)

preliminary inquiry into whether the Commission has acted within the authority granted to it by § 15(7)." (755a.)

Turning to such "preliminary inquiry," the court held, first, that the Commission is authorized under section 15(7) to suspend initial rate filings. (755a-57a.) The pertinent language of section 15(7) it found, has "no plain meaning," because "[t]he term 'new' can refer to both changed and initial rates or only changed rates," and the legislative history "yields little insight, . . ." (756a.) However, the court concluded on the basis of its "examination of statutes modeled on § 15(7) and of the legislative policy underlying that section . . . that it was Congress' intention that the Commission have the power to suspend initial as well as changed rates." (*Id.*) The court relied, as did the Commission, on the other suspension provisions in the Act, each of which contains a grandfather clause that exempts certain initial rates, concluding that "[i]f initial rates were not covered there would have been no need for the grandfather clauses."[40] (*Id.*) With respect to legislative policy, the court stated (757a):

> Section 15(7) evidences a belief on the part of Congress that the normal hearing and reparation processes of the ICC are not sufficient to protect the public against potentially excessive charges. The need for this protection is no less in the case of initial rates than in the case of changed rates. Absent a specific legislative decision that initial rates are not covered, it would be illogical to assume that Congress intended to leave such a gap in the legislative scheme.

[40] The court also cited section 1002(g) of the Federal Aviation Act, 49 U.S.C. § 1482(g), which is similar to section 15(7) except that it expressly prohibits suspension of initial tariffs. From this the court concluded that "if Congress had wished to exempt initial tariffs from the purview of § 15(7) it would have done so specifically. . . ." (756a-57a.)

The court also held that the Commission was authorized as "corollary to its suspension power" to suggest interim rates that it would allow the carriers to file without suspension. (760a.) The Commission, in the court's view, simply "chose not to exercise to its full limits the drastic but available power of unconditional suspension"—which would "leav[e] the carriers without any tariffs but free to file new tariffs if they wished" but subject to a "new exercise" of the suspension power. (757a-58a.) The court found, contrary to the carriers' position, that the section 15(7) suspension power was not "an all or nothing instrument" and that the Commission "may elect to exercise its power less than fully" in the manner that it did. (758a.)

The Commission's imposition of a keep-account and refund requirement, as a condition to its acceptance of interim rate filings, was likewise held to be within its authority. Such a condition—both as applied to interim rates during the suspension period and thereafter to the originally-filed rates—was also held to be a valid corollary to the Commission's suspension power.[41] (760a-61a.) As to the carriers' final contention that the Commission's action was an abuse of discretion and its interim rates confiscatory and violative of the Fifth Amendment, the court stated that "[a]ssuming that we can review the Commission Order through these constitutional entry points the record before us gives no basis upon which we can act." (761a.)

Having thus completed its threshold inquiry and determined that the Commission did not exceed its statutory authority, the court of appeals granted the motion

[41] The court disclaimed reliance on the authority expressly conferred by section 15(7) to require carriers to keep account and refund where "a proposed increased rate or charge" is suspended. (761a.)

to dismiss.[42] The carriers thereafter filed tariffs at the maximum interim rates that the Commission indicated it would not suspend.

On and after September 21, 1977, the carriers filed their petitions for certiorari in this Court and simultaneously sought stay relief. A stay of the Commission's order was granted by the Court on October 20, 1977, subject to a keep-account and refund condition; and an order embodying these terms was entered on November 14, 1977.[43] (784a-86a.) Certiorari was granted and the cases consolidated on November 28, 1977. (789a.)

SUMMARY OF ARGUMENT

The Commission was empowered under section 15(7) of the Interstate Commerce Act to issue the suspension order in this case.

1. Section 15(7) authorizes the Commission to suspend "any schedule stating a new individual or joint rate." A rate that has not previously been in effect is, literally, a "new" rate—whether an "initial" rate, as in this case, or a "changed" rate that replaces an earlier rate. This construction is supported by the purposes and legislative history of section 15(7), the Commission's long-standing interpretation, and subsequent legislation modeled upon section 15(7)—in which Congress repeatedly made clear its understanding that the authorization to suspend "new" rates embraces both initial and changed rates.

a. The grant of suspension power in the Mann-Elkins Act of 1910 was intended to correct serious deficiencies in the statutory scheme. Prior to 1910, the Commission could not disturb any carrier-filed rate, even where it was

[42] A petition for rehearing by petitioner BP was denied on September 8, 1977. (774a.)

[43] Justices Brennan, Marshall and Blackmun dissented from the November 14 order. (786a-88a.)

manifestly excessive, until after the rate had gone into effect and then only after a full investigation. Shippers who paid a rate ultimately found to be excessive could seek reparations, but this was found by Congress to be an inadequate remedy seldom used. And shippers had begun to seek injunctive relief in the courts against new rates claimed to be unreasonable, with diverse results that jeopardized the regulatory goal of uniformity.

Each of these concerns, which Congress remedied by giving the Commission comprehensive power to suspend new rates, exists as fully in the case of initial rates as changed rates. Under petitioners' construction of section 15(7), carriers would be able to file *any* initial rates, no matter how outrageously excessive, and the Commission would have no power to suspend. Nothing in the legislative history evidences a Congressional intent so opposed to the purposes, as well as the language, of the Act.

While much of the debate during Congress' consideration of the Mann-Elkins Act refers to the suspension power in the context of rate increases, this simply reflects the fact that in 1910—with the railroad system already in place, and oil pipelines (the only other transportation mode then subject to the Act) not yet a significant subject of regulation—attention was naturally focused on the problem of widespread increases in rail rates, rather than initial rates for new lines or services. But, as is not uncommon, the legislation enacted was more comprehensive than the immediate spur that gave rise to it. Congress worded the statute broadly to cover any "new" rate, and the suspension provision was frequently described during the debates in terms consistent with the inclusive scope that its purposes and language reflect. Petitioners have shown only what is evident: that "new" was intended to include changed rates. They have not shown that it was intended to exclude initial rates.

b. Section 15(7) has served as the model for many subsequently-enacted suspension provisions—in other parts of the Interstate Commerce Act and in other regulatory statutes—which demonstrate a clear Congressional understanding that section 15(7) authorizes the suspension of initial rates.

Thus, section 216(g) of the Act, enacted in 1935 and applicable to motor carriers, is identical to section 15(7) in authorizing the Commission to suspend "any schedule stating a new individual or joint rate . . . ." However, section 216(g) also provides that the suspension power "shall not apply to any initial schedule or schedules filed on or before July 31, 1938" by pre-1935 motor carriers. Similarly-worded suspension provisions—including comparable "grandfather" clauses for certain initial rates—were included in the legislation bringing water carriers (in 1940) and freight forwarders (in 1942) under the Act. Congress described these later provisions as containing "the same power to suspend new rates" as provided in section 15(7) (H.R. Rep. No. 2066, 78th Cong., 2d Sess. 22 (1942)).

These additions to the Act show that Congress understood the power to suspend "new" rates to include "initial" rates. The grandfather provisos would otherwise have been superfluous. Moreover, the fact that only narrow categories of initial rates were grandfathered unmistakably shows that all other initial rates were regarded as within the suspension power—a conclusion expressly confirmed by applicable legislative history.

The subsequently-enacted portions of the Act refute petitioners' argument that Congress could not have deemed it fair to allow suspension of an initial rate and thereby render a carrier unable to operate during the suspension period unless it filed an interim rate acceptable to the agency. That is exactly what Congress intended in authorizing suspension of "new" rates—including initial

rates—filed by motor carriers, water carriers and freight forwarders. There is no reason to suppose Congress intended differently by its use in 1910 of the identical words in authorizing suspension of "new" rates filed by railroads and oil pipelines.

Section 216(g) also refutes petitioners' "authoritative gloss" argument derived from the addition to section 15(7) in 1920 of a provision that if a rate investigation is not completed during the suspension period, "the proposed change of rate" shall go into effect. The identical language appears in section 216(g), which undeniably authorizes suspension of initial rates.

c. The Commission has repeatedly over many years interpreted its suspension authority under section 15(7) as extending to initial rates. Petitioners' claim that the Commission's decisions did not involve "original rates" but merely "changes in prior classifications or practices" has no basis.

2. Petitioners' argument that the Commission unlawfully "prescribed" rates, by informing the carriers of maximum interim rates that it would not suspend, misconceives what the Commission did. Petitioners could not object if the Commission suspended their initial filings without more, leaving the carriers with the unhappy choice of either waiting out the suspension period or refiling lower interim rates (subject each time to suspension) until a level was reached that the agency would accept. Yet petitioners do object that the Commission instead sought to avoid a lengthy trial-and-error process of that kind—a process which, since the pipeline was ready for operation, would have served the interests of neither the carriers nor the public. Obviously, petitioners' objection is not so much to the alleged "prescription" of interim rates as it is to the suspension of their higher initial filings. Failure to suspend, however, would have constituted an abandonment of the Commission's "mandate to

assess the reasonableness of the rates and to suspend them pending investigation if there is a question as to their legality" (*United States* v. *Chesapeake & Ohio Railway Co. ("Chessie")*, 426 U.S. 500, 514 (1976)).

The Commission's action indicating interim rates it would not suspend is supported by *Chessie*, where the agency announced it would withhold suspension of a rate increase if the increased revenues were spent for specified purposes. The Court held that this "condition precedent to the immediate implementation of the rate increase" was "a legitimate, reasonable, and direct adjunct" to the Commission's suspension power (426 U.S. at 513-14).

3. The Commission was likewise authorized to require, as a condition of its acceptance of the interim rates without suspension, that the carriers agree to keep account and to refund any charges in excess of the just and reasonable rate levels determined in the formal investigation. *Chessie* upheld the Commission's authority to impose "condition[s] precedent" to its acceptance of rate filings without suspension that are "directly related" to its "mandate" under the suspension power (426 U.S. at 513-14). Here too, the Commission's conclusion that even the interim rates—which were premised on the carriers' own cost data and utilized a higher rate of return than in prior cases involving crude oil pipelines—"may prove upon investigation to exceed reasonable levels" (636a), and that a refund condition was therefore necessary, was "directly related" to its "mandate" to suspend new rates "if there is a question as to their legality."

Nothing in section 15(7) or its legislative history indicates that Congress, by providing expressly for refunds where a suspended increase goes into effect before a formal investigation can be completed, intended to deny the Commission discretion to impose a similar requirement as a condition to withholding suspension of an initial or decreased rate.

4. The Commission's order does not contravene any rights of the carriers under the Fifth Amendment. The carriers are receiving a full hearing in the current investigation, and they were afforded an extraordinary measure of due process at the suspension stage. The interim rates, which provide a composite 23 percent return on equity using the carriers' own cost data, are surely not confiscatory. They will likely prove to be on the high side—which is why the Commission insisted on a refund condition.

ARGUMENT

Suspension actions within the Commission's statutory authority are not subject to review in the courts. *United States* v. *Students Challenging Regulatory Agency Procedures ("SCRAP I")*, 412 U.S. 669 (1973); *Arrow Transportation Co.* v. *Southern Railway Co. ("Arrow")*, 372 U.S. 658 (1963). This rule, contrary to petitioners' suggestion (Pet. Br. 34 n.50), is applicable to both orders suspending new rates and decisions not to suspend. As stated in *Arrow*, "courts consistently decline to suspend rates when the Commission has refused to do so, or to set aside an interim suspension order of the Commission." 372 U.S. at 670. The basic reasons for nonreviewability—avoidance of "diverse" decisions by the courts, recognition that section 15(7) represents a "careful accommodation" of interests that would be "disturb[ed]" by judicial review, and prevention of "an undesirable interference" with the orderly exercise of the Commission's suspension power (*SCRAP I*, 412 U.S. at 696-98)—apply as much to a suspension order as to a decision not to suspend.[44]

[44] Lower courts, both before and after *Arrow*, have dismissed for lack of jurisdiction suits to enjoin a Commission suspension order. *E.g.*, *Great Western Packers Express, Inc.* v. *United States*, 246 F. Supp. 151 (D. Colo. 1965) (three-judge court); *Consolidated Truck Service, Inc.* v. *United States*, 193 F. Supp. 773 (D.N.J. 1960) (three-judge court). *Cf. Long Island Rail Road Co.* v. *United States*, 193 F. Supp. 795 (E.D.N.Y. 1961) (three-judge court). *See* K. Davis, *Administrative Law Treatise* § 28.16, at 966 (1970 Supp.) ("One important area of administrative action in which judicial review is unavailable even if the agency acts arbitrarily or in abuse of discretion involves the suspension or refusal to suspend newly filed rates.")

To be sure, suspension is "a particularly potent tool" (*Chessie*, 426 U.S. 500, 513 (1976)) and may cause unrecoverable loss to a carrier; that is why Congress limited the suspension period to seven months.[45] But failure to suspend may result in irreparable injury to small shippers, their customers, consumers and others (as here); the inadequacy of a reparations remedy was a prime reason why Congress added the suspension power in the first place.[46]

We agree with the court of appeals that a Commission suspension order is reviewable for the purpose of determining whether the agency was authorized to issue it.[47] We submit that in this case the Commission's order was fully within its statutory authority.

I. THE COMMISSION HAD AUTHORITY UNDER SECTION 15(7) OF THE ACT TO SUSPEND THE CARRIERS' INITIAL RATES.

In construing a statute the Court's "first reference is of course to the literal meaning of the words employed" (*Flora* v. *United States*, 357 U.S. 63, 65 (1958)).[48] Since 1910 the Commission has been empowered under section

[45] *See Arrow*, 372 U.S. at 664-66.

[46] *See* discussion, pp. 34-35, *infra*.

[47] The court of appeals cited the large volume of information that the Commission had before it at the suspension stage and also attached to its opinion the reasoned order that the Commission issued. (750a-51a.) Thus, the instant case does not present the issue of reviewability of a suspension order entered by an agency either without any facts before it or without giving any reasons.

[48] *See also Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring): "The starting point in every case involving construction of a statute is the language itself."

15(7) of the Interstate Commerce Act to suspend, pending investigation of its lawfulness, "any schedule stating a *new* individual or joint rate, fare, or charge" (emphasis added). Petitioners in this case, advancing a novel interpretation of the statute, argue that "any . . . new" rate does not mean every new rate. Instead, they say, it means only a rate that is new because it changes an existing rate for an old service, and does not include a rate that is new in the most literal sense—a new rate for a new service.

A most persuasive showing of legislative history, Congressional purpose, administrative construction and judicial precedent is required to sustain an interpretation of statutory language so at war with its literal meaning.[49] Petitioners have not come close to carrying this burden. Indeed, as we shall show, all of the relevant aids to statutory construction point the other way.

Petitioners' interpretation ignores the reasons why Congress empowered the Commission to suspend rates pending final decision on their lawfulness. Petitioners claim no less than the right to charge *any* initial rate, no matter how outrageously excessive, free from any power of the Commission to suspend[50]—notwithstanding the clear

[49] While the courts, in interpreting a statute, do "have some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results * * * or would thwart the obvious purpose of the statute' . . . it is otherwise 'where no such consequences [would] follow and where * * * it appears to be consonant with the purposes of the Act * * *.'" *Commissioner of Internal Revenue* v. *Brown*, 380 U.S. 563, 571 (1965) (citations omitted).

[50] That this is exactly the import of petitioners' contention was acknowledged by one of their attorneys when asked by Commissioner Hardin during the oral argument: "If we do not have the power to suspend then would the carriers be in a position to file a rate, say, at $35 a barrel and the Commission still could not suspend it?" Counsel for petitioner Exxon, while describing the example as a "horror

intent of Congress that the suspension authority would constitute a "tremendous power"[51] for enforcing the basic statutory mandate that "[*a*]*ll* charges . . . [for] transportation . . . shall be just and reasonable."[52] Petitioners do not deny that the suspension power was enacted to protect shippers and consumers against economic injury resulting from excessive increased rates, for which reparations was not considered an adequate remedy. Yet they argue that Congress failed to provide the same protection with respect to excessive initial rates that may have an identical economic impact.

Crucial to petitioners' position is their erroneous assumption that Congress could not have intended to allow the Commission to suspend a carrier's initial tariff, and thereby leave the carrier with the alternatives of not operating during the suspension period or of filing an interim tariff acceptable to the agency. Throughout their brief, petitioners choose to emphasize the former alternative and to shrug off the important fact that a carrier whose initial tariff is suspended is still free to file a tariff that is acceptable to the Commission on an interim basis, and to operate under such tariff during the suspension period. While the carrier may not regard the interim rate as desirable, it is no worse off than a carrier whose increased rate is suspended and which, as a result, is forced to operate for seven months on the basis of an existing rate that it has found wholly inadequate (or even "confiscatory") and therefore proposes to increase.

As shown below, petitioners' position is in conflict with the Commission's own long-standing practice. Moreover,

case," replied: "If you do not have that power, that would be right. That would be Congress's decision." (App. (Vol. III), Ex. 1, pp. 17-18).

[51] *Chessie*, 426 U.S. at 513, *quoting*, Senator Elkins (45 Cong. Rec. 3471 (1910)).

[52] 49 U.S.C. § 1(5) (emphasis added).

Congress has repeatedly made clear its intent, in enacting subsequent legislation modeled after section 15(7), that a carrier's initial rates are indeed subject to suspension. In so doing, Congress confirmed its understanding that the words granting the suspension power mean what they say: the power to suspend "new" rates embraces both initial and changed rates.

A. The Legislative History of the Mann-Elkins Act is Fully Consistent with the Applicability of Section 15(7) to Initial Rates.

Section 15(7) of the Interstate Commerce Act is derived from section 12 of the Mann-Elkins Act of 1910 (36 Stat. 539, 551). Prior to its enactment the Commission, empowered by the Hepburn Act of 1906 (34 Stat. 589) to determine the validity of a carrier's existing rates, could initiate a proceeding against a rate believed to be unlawful only after the rate had gone into effect. Moreover, it had no power to disturb such rate until after completion of a full investigation. *See Chessie*, 426 U.S. at 510, 513. If the rate was ultimately found to be excessive, shippers who had paid it could seek reparations; but this was widely recognized as an inadequate remedy. The Senate Committee, citing deficiencies of the statute as it then stood, stated:

> It is true that . . . a shipper who has paid a rate subsequently adjudged to be unreasonable may compel restitution by the carrier of the excessive rate paid; but in practice it is found that such restitution is but seldom sought or awarded; probably because the shipper generally recoups himself from the public for the amount of the loss through the augmented price of the commodity. [S. Rep. No. 355, 61st Cong., 2d Sess. 8 (1910).][53]

See also Chessie, 426 U.S. at 513 n.10.

[53] President Taft, in proposing that the Commission be given the suspension power, had also cited the inadequacy of the reparations remedy as a reason why such legislation was needed:

By providing the Commission with authority to suspend, Congress enabled the agency to block, at least temporarily, those rates which might prove to be unlawful—thereby "safeguarding the community against irreparable losses and recognizing more fully that the Commission's essential task is to establish and maintain reasonable charges and proper rate relationships." *Chessie*, 426 U.S. at 513, *quoting* 1 I. Sharfman, *The Interstate Commerce Commission* 59 (1931).

Another factor influential in inducing Congress to provide the Commission with suspension power was the frequency with which shippers had been resorting to the courts to seek injunctions against carrier rates claimed to be unreasonable. *Arrow*, 372 U.S. at 663. The Commission had, for several years prior to 1910, directed Congress' "attention to the fact that such courts as entertained jurisdiction were reaching diverse results, which engendered confusion and produced competitive inequities." *Id.* As a practical matter, only large shippers could generally afford to pursue such judicial relief, leaving weaker competitors seriously disadvantaged when it was obtained. I.C.C. Annual Report 12 (1908). In addition, due to the divergent conclusions reached by different courts regarding the reasonableness of particular rates, "the regulatory goal of uniformity was jeopardized." *Arrow*, 372 U.S. at 664.[54]

> Experience has shown that many, perhaps most, shippers do not resort to proceedings to recover the excessive rates which they may have been required to pay, for the simple reason that they have added the rates paid to the cost of the goods and thus enhanced the price thereof to their customers, and that *the public has in effect paid the bill.* [H.R. Rep. No. 923, 61st Cong., 2d Sess. 3 (1910); emphasis added.]

[54] In the hearings on the Mann-Elkins Act, the National Industrial Traffic League, an association of shippers, had similarly cited "the complications growing out of these orders issued by federal courts and the impracticability of a great number of small shippers secur-

The resulting "disparity of treatment as between different shippers, carriers, and sections of the country, causing in turn 'discrimination and hardship to the general public,'" as this Court said, "brought the whole problem to a head" and led to enactment of the suspension power. *Arrow*, 372 U.S. at 664. *See also Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 820 (1973); Spritzer, *Uses of the Summary Power to Suspend Rates: An Examination of Federal Regulatory Agency Practices*, 120 U. Pa. L. Rev. 39, 45-47 (1971).

The policies thus sought to be served by Congress in granting the suspension power are no less applicable to initial rates than they are to increases or other changes in existing rates. Under petitioners' view, the public would be saddled with every initial rate filed by a carrier, however excessive and probably unlawful, until completion of the Commission's formal investigation. That was not the view of Congress, which expressly recognized the inadequacies of the reparations remedy and sought to prevent excessive rates from becoming effective by empowering the Commission to suspend. The need to suspend an excessive initial rate is just as compelling and just as much within the Congressional purpose as an excessive increased rate. If the Commission could not suspend it, an excessive initial rate would be as likely to induce those who are adversely affected to resort to the courts for injunctive relief as would an excessive increase —a result wholly at odds with the Congressional purpose. The court below was clearly correct in concluding that "[a]bsent a specific legislative decision that initial rates are not covered, it would be illogical to assume that Congress intended to leave such a gap in the legislative scheme." (757a.)

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ing protection" as reasons for urging Congress to authorize the Commission to suspend new rates. (Hearings on Bills Affecting Interstate Commerce Before the Comm. on Interstate and Foreign Commerce of the H.R., 61st Cong., 2d Sess. 437-39 (1910).)

Understandably, discussion of the suspension power appearing in the legislative debates in 1910 frequently refers to its application in the context of rate increases or other changes in existing rates. As the Commission pointed out, "the reason . . . is clear: the vast majority of rate proceedings involve situations where increases in existing rates are at issue." (626a.) Moreover, the Nation's rail system was already in place by 1910,[55] and since it was primarily concern over widespread increases in existing railroad rates—rather than initial rates for new lines or new services—that prompted Congressional consideration of suspension authority, it is not surprising that much of the discussion was addressed to that situation,[56] thus explaining many of the statements cited in petitioners' brief.[57] Petitioners have shown what could

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[55] This of course was not true of oil pipelines which were made subject to part I of the Interstate Commerce Act by the Hepburn Act of 1906 (34 Stat. 584).

[56] That Congressional action may have been prompted by immediate concern over increases in railroad rates does not, of course, limit the scope of the language enacted—language entirely consistent with the Act's broad purposes. *See, e.g., Arrow*, 372 U.S. at 69, where this Court concluded, in view of the broad goals sought to be achieved by the Act, that Congress, in giving the Commission power to suspend a carrier's rates, must have intended by implication to foreclose resort to the courts by competing carriers as well as by shippers, stating:

> It must be admitted that Congress dealt with the problem as it affected the relations between shippers and carriers, making no express reference to the interests of competing carriers and their customers such as are involved in the instant case. We see no warrant in that omission, however, for a difference in result.

See also Pfizer, Inc. v. *Government of India*, 46 U.S.L.W. 4073 (U.S. January 11, 1978) (No. 76-749) ("The fact that Congress' foremost concern in passing the antitrust laws was the protection of Americans does not mean that it intended to deny foreigners a remedy when they are injured by antitrust violations." *Id.* at 4075.)

[57] Even so, petitioners misleadingly characterize this discussion. The references at p. 22 at n.29, of their brief are all to statements made during debate on a proposed amendment to the Mann-Elkins

not be disputed: that "new" rates were intended to include increased rates. Missing from their recital of the legislative history is evidence of an intent to exclude initial rates.

The undeniable fact is that Congress did not in terms limit the suspension power to "increased rates" or "changed rates," but extended it comprehensively to "any schedule stating a new . . . rate." Moreover, the suspension provision was frequently described during the legislative debates in terms consistent with the inclusive application that its purposes would suggest. Thus, Senator Elkins stated during the Senate debates:

> As I have said before, the making of rates, fares, and schedules are [sic] more within the control of the Interstate Commerce Commission under the bill than ever before.
>
> The Commission can suspend them the moment they are filed. They can proceed on their own motion to investigate them. . . .
>
> This virtually puts the rate-making power in the hands of the Interstate Commerce Commission. It is a tremendous power. [45 Cong. Rec. 3471 (1910).]

Congressman Townsend, the original sponsor of the legislation in the House of Representatives, stated in unqualified terms that the suspension power "permits the commission, either upon complaint or on its own motion,

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bill offered by Senator Cummins on May 17, 1910. That amendment provided for the automatic and indefinite suspension of "any schedule stating a new individual or joint rate, fare, or charge *which is an increase over* the then existing rate" until such time as the Commission found it to be just and reasonable. (45 Cong. Rec. 6409 (1910) (emphasis added).) Quite naturally, arguments favoring that amendment, which was defeated on May 26, 1910 (45 Cong. Rec. 6915 (1910)), emphasized the fact that where a rate *increase* was indefinitely postponed, there would be an existing rate already in effect that the carrier could charge in the interim.

to determine the justness and reasonableness of agreements, classifications, rates, charges, and regulations before they go into effect." (45 Cong. Rec. 5232 (1910).) And Congressman Mann, who became the measure's chief spokesman in the House, pointed out that it would apply to a "schedule of rates . . . proposing to change an existing rate" and "a schedule stating a new rate" (45 Cong. Rec. 4711 (1910)).[58]

In addition, while the Mann-Elkins Act expressly subjected "any schedule stating a new . . . rate" to the suspension power, it also provided that in a proceeding involving an "increased rate or proposed increased rate" the burden would be placed on the carrier to prove the reasonableness of the rate.[59] That additional consequences were thus attached to an "increased rate or proposed increased rate" certainly suggests that the suspension

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[58] As Congressman Mann stated:

> We have . . . provided in the bill that where the schedule of rates is filed with the commission proposing to change an existing rate, the commission shall have authority to suspend the taking effect of that rate; and we provide that when there shall be filed with the commission a schedule stating a new rate or classification or regulation or practice, the commission . . . may suspend the operation of the proposed rate, classification, regulation or practice. . . . [45 Cong. Rec. 4711 (1910).]

[59] The pertinent language read as follows:

> At any hearing involving a rate increased after January first, nineteen hundred and ten, or a rate sought to be increased after the passage of this Act, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carrier, and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. [36 Stat. 539, 551 (1910)]

In 1940 this provision was modified to place the burden of proof on the carrier in any such proceeding involving "a change in a rate," thereby encompassing decreased rates. 54 Stat. 911, 912 (1940). As discussed below, the Commission's decisions distinguish between "change[d]" rates and initial rates for purposes of assigning the burden of proof (p. 49, *infra*).

authority itself was intended to be more encompassing in scope. *See* discussion, pp. 48-49, *infra*.

B. The Suspension Provisions in Other Parts of the Interstate Commerce Act as well as in Other Regulatory Statutes Confirm the Commission's Power to Suspend Initial Rates Under Section 15(7).

Congress in subsequent years repeatedly manifested its understanding that section 15(7) authorizes the suspension of initial rates. This is readily shown by comparing section 15(7) with the suspension provisions contained in other parts of the Interstate Commerce Act as well as in other regulatory acts—for all of which section 15(7) has served as the model. Many of these later enactments demonstrate, as the court below pointed out, that "when Congress has wished to exclude initial rates, either in part or across the board, it has done so in specific language." (756a.)

1. Section 216(g) of the Interstate Commerce Act,[60] adopted when motor carriers were brought within its coverage in 1935, is identical to section 15(7) in providing that the Commission may suspend "any schedule stating a new individual or joint rate, fare, charge or classification," for a period of seven months. However, section 216(g) contains a "grandfather" proviso which, in its present form, states that "this subsection shall not apply to any *initial* schedule or schedules filed on or before July 31, 1938, by any such carrier in bona fide operation on October 1, 1935" (emphasis added).[61] When

[60] 49 U.S.C. § 316(g). This provision applies to common carriers by motor vehicle. An almost identical provision, section 218(c), 49 U.S.C. § 318(c), applies to contract carriers by motor vehicle.

[61] As originally enacted in 1935, the grandfather proviso to section 216(g) stated that the suspension power "shall not apply to any initial schedule or schedules filed by any such carrier in bona fide operation when this section takes effect [October 1, 1935]" (49 Stat. 558.) As discussed in the text, *infra*, the present wording—which

water carriers and freight forwarders likewise became subject to regulation under the Act (in 1940 and 1942, respectively), similarly-worded suspension provisions—with comparable grandfather provisos for certain initial rates—were included in the legislation.[62] These additions to the Act are significant here.

First, they demonstrate that Congress understood the words "any schedule stating a new . . . rate" as including initial rates. Otherwise, a grandfather proviso would have been entirely unnecessary. If such a proviso exempted *all* initial rates, it might arguably be explained as simply the product of an abundance of Congressional caution (*see* Pet. Br. 29). But where the proviso exempts only a narrow category of initial rates, the inescapable implication is that all other initial rates are included.

This Congressional intent is confirmed by the legislative history of sections 216(g) and 218(c) (*see* n.60, p. 40, *supra*). As originally adopted in 1935, no time limit was provided for the filing of an initial tariff by a grandfather motor carrier in order for such tariff to come within the scope of the proviso. 49 Stat. 560. In 1938, however, these sections were amended to set a deadline of July 31, 1938. 52 Stat. 1240. The purpose of the deadline was explained in the House Committee report as follows:

> Sections 14 and 15 propose to amend sections 216(g) and 218(c), respectively, of said act to permit the Commission to suspend any initial schedule of a common carrier or schedule or contract of a contract

provides a July 31, 1938 cutoff date for exemption of initial tariffs filed by grandfather motor carriers—was added in 1938 (52 Stat. 1240).

[62] Section 307(g), 49 U.S.C. § 907(g) (applicable to common carriers by water); section 307(i), 49 U.S.C. § 907(i) (applicable to contract carriers by water); section 406(e), 49 U.S.C. § 1006(e) (applicable to freight forwarders).

> carrier filed after the date that the provisions of the bill shall have become effective. The purpose of the proposed amendment is to prevent future filings of initial tariffs and schedules by motor carriers who were in bona fide operation on June 1, or July 1, 1935, without the exercise by the Commission of its suspension power. [H.R. Rep. No. 2714, 75th Cong., 3d Sess. 4-5 (1938).]

The legislative history of the later enactments bringing water carriers and freight forwarders under the Interstate Commerce Act likewise demonstrates that the statutory power to suspend "new" rates was understood by Congress to include "initial" rates. The suspension power given the Commission over the rates of water carriers in the Transportation Act of 1940 (54 Stat. 935, 938)—which applies to "any schedule . . . stating a new rate, fare [or] charge"—was described in the House Committee report as "similar to section 15(7) of part I" (H.R. Rep. No. 1217, 76th Cong., 1st Sess. 23-24 (1939)). The water carrier suspension provision included a grandfather exemption applicable to "any initial schedule filed prior to October 1, 1941 . . . ." (54 Stat. 939).[63]

Similarly, the legislation extending the Act to freight forwarders included suspension authority applicable to "any tariff stating a new rate," with a grandfather proviso protecting "any initial tariff filed prior to the expiration of ninety days after the date of enactment of this provision." (56 Stat. 288, 299.) The freight-forwarder suspension provision was described in the Conference Report as providing "the same power to suspend new rates as is provided for under parts I, II, and III of the act" (H.R. Rep. No. 2066, 78th Cong., 2d Sess. 22 (1942)).[64]

[63] The limited scope of this exemption was criticized by one of the Committee members during the floor debates on the ground that it could prevent a newly-authorized carrier from operating during the suspension period. As argued unsuccessfully by Congressman Wadsworth (with respect to contract water carriers): "Having secured his permit and desiring to go into business, he files with the Interstate Commerce Commission his contracts and his rates . . . . The Interstate Commerce Commission may suspend that rate for 6 months." (84 Cong. Rec. 9707 (1939).)

Second, the subsequently-enacted portions of the Act refute petitioners' central premise—their claim that Congress could not have deemed it fair to allow suspension of an initial tariff and thereby render a carrier unable to operate during the suspension period absent the filing of an interim tariff acceptable to the agency. That is exactly what Congress intended when it provided for the suspension of "new" rates—including initial rates—filed by motor carriers, water carriers and freight forwarders. And there is no reason to suppose that it intended differently when it used the very same language in the Mann-Elkins Act to provide for suspension of "new" rates filed by railroads and oil pipelines.

These additions to the Act are likewise wholly inconsistent with petitioners' view of the suspension power as limited to preserving the *status quo* in situations where there is an existing rate (Pet. Br. 32-33). Obviously, that was not the view that Congress had of the suspension power in these various enactments.

Third, the wording of section 216(g) rebuts another principal contention of petitioners, namely, their claim of an "authoritative gloss" placed upon section 15(7) in 1920 (Pet. Br. 24-26). In the course of amending section 15(7) in several respects in 1920, Congress added language declaring that if a rate investigation was not completed by the end of the suspension period, "the

[64] This description refers to the House bill, which "granted this [suspension] power with respect to all new rates . . . including those initially filed under part IV." H.R. Rep. No. 2066, 78th Cong., 2d Sess. 22 (1942). The Conference adopted the House version of the suspension power but added the grandfather proviso quoted in the text.

proposed change of rate" would go into effect.[65] Although the legislative history of the 1920 Act is completely silent as to why this particular wording was chosen, petitioners find in it proof of Congress' understanding that the statutory reference to any "new" rate meant the same thing as "change of rate" (Pet. Br. 25). However, exactly the same phrase (*i.e.*, "proposed change of rate") was also used in section 216(g) which, as we have shown, unmistakably authorizes the suspension of initial rates. Thus, absent more persuasive evidence of Congressional intent, the phrase cannot be regarded as limiting the scope of the suspension power to a "change" of rates. Since Congress undeniably did not intend the phrase to have that effect when it was included in section 216(g), there is no reason to assume such an intent when it was added to section 15(7).

2. Reference to other regulatory statutes containing suspension provisions modeled after section 15(7) is also instructive.

For example, section 204 of the Federal Communications Act, as originally enacted, authorized the Federal Communications Commission to suspend "any new charge, classification, regulation or practice. . . ."[66] Pursuant to this authority, the FCC, in *In re Western Union International, Inc.*, 28 F.C.C.2d 727 (1971), suspended an initial tariff provision because of its apparent inconsistency with other tariff provisions. The Commission acknowledged "that this leaves WUI without a tariff provision concerning this point," and therefore granted the carrier "permission to file, on short notice, tariff amendments . . . pending the outcome of an investigation. . ." 28 F.C.C.2d at 728-29. The FCC denied the carrier's motion for reconsideration, which claimed that it was without authority to suspend an initial tariff,

[65] Transportation Act of 1920, 41 Stat. 456, 486.

[66] 48 Stat. 1071 (1934), 47 U.S.C. § 204.

the FCC pointing out that the suspension would not "force [the] carrier to cease operations" because it had been allowed to file an amended tariff to be effective during the suspension period. *In re Western Union International, Inc.*, 31 F.C.C.2d 554, 556 (1971).

Shortly thereafter, Congress confirmed that the FCC had correctly interpreted the statutory reference to "any new charge." In the course of amending the Communications Act for other purposes it substituted the words "any new *or revised* charge" for the words "any new charge," explaining that this change was intended as a clarification of the agency's existing authority.[67]

[67] As the House Committee report stated:

> Section 204 of the Act (47 U.S.C. 204) is in effect, redesignated section 204(a) and is amended to extend from 3 to 5 months the period during which the Commission may suspend the operation of a tariff filing in whole or in part pending hearing on the lawfulness thereof. Other minor language changes in the subsection *clarify* that the provisions of the subsection are applicable to new as well as revised charges, classifications, regulations or practices. [H.R. Rep. No. 94-1315, 94th Cong., 2d Sess. 6 (1976) (emphasis added).]

See also S. Rep. No. 94-918, 94th Cong., 2d Sess. 7 (1976).

A similar construction has been given to the suspension provision of the Intercoastal Shipping Act of 1933 which, like section 15(7), provides that such power may be invoked whenever there is filed "any schedule stating a new individual or joint rate, fare, or charge . . . ." 46 U.S.C. § 845. As the Maritime Commission ruled with respect to this provision:

> Respondents contend our order of investigation and suspension was unauthorized by the statute because the tariffs were "initial" filings of actual rates, and that such action strictly construed would have precluded operation of their vessels because of the restriction in section 2, of the Intercoastal Shipping Act that "no person shall engage in transportation * * * unless and until its schedules * * * have been duly and properly filed and posted." We are authorized to suspend "any" schedule stating a "new" rate. [*Puerto Rican Rates*, 2 U.S. Mar. Comm'n 117, 122-23 (1939). *See also North Carolina Line-Rates To and From Charleston, S.C.*, 2 U.S. Mar. Comm'n 83 (1939).]

In contrast, when Congress in the Federal Aviation Act authorized the Civil Aeronautics Board to suspend rates, it included an express proviso denying the Board the power to suspend "any initial tariff." 49 U.S.C. § 1482(g). Thus, as the court below concluded after reviewing these various statutory provisions, "if Congress had wished to exempt initial tariffs from the purview of § 15(7) it would have done so specifically, and . . . Congress' omission to specially exempt initial rates in this section indicates its intent that initial rates be subject to the ICC's § 15(7) suspension powers" (756a-57a).[68]

3. Petitioners attempt to distinguish the provisions of the Interstate Commerce Act authorizing suspension of initial rates in the case of motor carriers, water carriers and freight forwarders, and also the suspension provision applicable to carriers under the Communications Act, on the ground that in those cases the agency possesses licensing power—a power it does not have with respect to oil pipelines and which it did not have with respect to railroads until 1920. (Pet. Br. 29-30 & n.42.) Authorization to suspend initial tariffs in this context, they argue, "would reflect no more than a desire to give the Commission plenary licensing authority" (*id.* at 30).

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[68] The reliance placed by petitioners (Pet. Br. 29) on the Federal Power Commission's interpretation of its suspension authority under section 4(e) of the Natural Gas Act (15 U.S.C. § 717c(e)) and section 205(e) of the Federal Power Act (16 U.S.C. § 824d(e)) is misplaced. The pertinent statutory language of the Natural Gas and Federal Power Acts (which in all relevant respects are identical to each other) is plainly more limited than that of section 15(7) of the Interstate Commerce Act. The suspension authority under section 4(e) of the Natural Gas Act applies to "any *such* new schedule" (emphasis added)—a term that clearly has reference to the immediately preceding subsection of that Act. That preceding subsection (section 4(d), 15 U.S.C. § 717c(d)) is concerned solely with changes in existing tariffs and the requirement for filing such changes.

They add (somewhat puzzlingly) that since the Commission "has already reviewed the proposed original rate of a motor carrier, water carrier or freight forwarder at the time it issues a certificate of public convenience and necessity . . . it would be inconsistent for it then to 'suspend' that rate." *Id.* at 30 n.43.

Petitioners' asserted distinction does not withstand analysis. To begin with, Congress has not said one word that supports their rationale. Even more importantly, if an agency is empowered to withhold or condition a license upon the setting of initial rates that it deems appropriate—*see, e.g., Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959), cited by petitioners—then there is that much *less* reason for Congress to give it independent authority to suspend initial rates. Conversely, where, as in the case of oil pipelines and railroads prior to 1920, the agency lacks licensing authority, the suspension power would be its only preventive defense against the institution by carriers of excessive initial rates.

As to petitioners' contention that the Commission has reviewed the carrier's initial rates at the time it issues a license, that is not the fact. Unlike the Power Commission, the ICC in practice does not review a carrier's proposed initial rates when considering its application for a certificate.[69] The Commission has frequently

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[69] The official form prescribed by the Commission for a motor carrier to use in requesting a certificate of public convenience and necessity (Form OP-OR-9, issued pursuant to 49 C.F.R. §§ 1003.1, 1130.1 (1976)) does not even provide for the submission of the carrier's proposed initial tariffs. Under Commission practice a carrier has ninety days *after* a certificate is granted within which to file its proposed initial tariffs.

In the case relied on by petitioners at Pet. Br. 30 n.43 (*West Coast Bus Lines, Ltd., Common Carrier Application*, 41 M.C.C. 269 (1942), *aff'd sub nom. North Coast Transp. Co.* v. *United States*, 54 F. Supp. 448 (N.D. Cal.), *aff'd in part and dismissed in part*, 323 U.S. 668

suspended the initial rates of motor carriers *after* giving the carrier operating authority (*see* pp. 50-51, *infra*).[70] Further, the express language and legislative history of the motor carrier provisions show unequivocally that Congress empowered the Commission to suspend the initial rates of carriers which already had operating authority under the Act.[71]

C. The Commission's Interpretation of its Suspension Power as Applying to Initial Rates is Entitled to Great Weight.

On a question of statutory construction "this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration," *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), which "should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1968). *See also Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395, 409-10 (1975); *United States* v. *American Trucking Associations*, 310 U.S. 534, 549 (1940).

The Commission has repeatedly interpreted its suspension authority under section 15(7) as extending to initial rates. The first reported decision appears to be *Cotton from New Orleans*, 49 I.C.C. 751, 752 (1918), where the Commission noted that "[t]he local rates under suspension in this proceeding . . . were new rates in the sense that respondent had not previously

(1944), the applicant bus company submitted its proposed initial rates in the course of the certification proceedings only because it was seeking certification on the ground that its rates would be lower than those of an existing bus line.

[70] As *In re Western Union Int'l, Inc.*, 28 F.C.C. 2d 727 (1971), discussed *supra*, p. 44, indicates, this is also true under the Communications Act.

[71] *See* pp. 41-42, *supra*.

filed its port-to-port rates with the Commission." It therefore held the rates to be "initial rates" for purposes of determining which party had the burden of proof (*id.* at 753).[72]

In 1940 section 15(7) was amended to provide that if the suspended tariff involved a "changed" rate, classification or practice—rather than just an "increased" rate (*see* n.59, p. 39, *supra*)—the carrier would have the burden of proving it just and reasonable in the formal investigation. Thereafter, the Commission again concluded that the burden-of-proof proviso was not coextensive with its suspension power and that, in addition to "changed" rates, the suspension power applied in cases of "initial" rates where the protestant, rather than the carrier, would bear the burden of proof. In *Rail-Water, Grain in Bulk, Missouri, Illinois and Indiana to Buffalo*, 321 I.C.C. 564 (1963), involving the suspension of certain initial joint rates filed by a rail carrier and a water carrier, the Commission supported this conclusion by the following analysis of the Act:

> Of particular significance are the express terms found in sections 15(7) and 307(g). Each provide for suspension and/or investigation of "* * * a new rate * * *" which encompasses both changed and initial. However, each section places the burden of proof upon the proponent of only a "changed" rate. The distinction between the meaning of the two terms becomes readily apparent from the excepted provisions of section 307(g) which "shall not apply to any *initial* . . . schedule filed prior to October 1, 1941 * * *." Further support for this distinction is found in section 307(i) relating to water contract carriers whereby "a charge for a new service or a reduced

[72] As previously noted, section 15(7) originally provided that if the suspended rate was an "increased rate," the carrier would have the burden of proving it to be just and reasonable in the subsequent investigation. *See* p. 39, *supra*.

charge * * *" may be suspended and/or placed under investigation, but the subsection "shall not apply to any *initial* . . . schedule filed * * *." Comparable provisions with similar distinctions in the use of these terms as heretofore enumerated are also found in sections 216(g), 218(c), and 406(e) of the act governing motor common and contract carriers and freight forwarders respectively. Consequently, within the entire statutory framework, there is consistently recognized an express difference between "initial" and a "changed" rate . . . . [*Id.* at 566-67 (emphasis by the Commission).]

Petitioners attempt to distinguish these decisions on the ground that they did not involve "original rates" (*i.e.*, first and only rates, as we understand it), but merely "changes in prior classifications or practices" (Pet. Br. 27-28 n.39). This distinction, however, is entirely petitioners' own creation, for there is no evidence that the Commission has distinguished between "original" rates and "initial" rates in determining the scope of its suspension power.[73] For example, in *Bituminous Coal via Motor-Rail from Lynnville, Indiana to Chicago, Illinois*, 313 I.C.C. 573 (1961), the Commission suspended a single motor-rail rate under sections 15(7) and 216(g) of the Act, noting that the rail and motor carriers involved:

> have not previously transported coal over any route from Lynnville to Chicago, and so far as appears the [railroad] is not a party to any rate on coal over any route from Lynnville to the Chicago district. Thus, the proposed rate is an initial rate . . . ." [*Id.* at 574.]

[73] Petitioners claim support for their asserted distinction by reading the burden-of-proof provision of section 15(7), as amended in 1940, as placing the burden on the carrier to justify any "changed rate" but not a "changed classification or practice" (Pet. Br. 27 n.39). This reading of the statute is incorrect. The burden-of-proof provision, as revised in 1940 and still in effect, refers to a "changed rate, fare, charge, classification, regulation, or practice . . . ."

Moreover, under section 216(g) of the Act—which is in all pertinent respects identical to section 15(7)—the Commission has repeatedly suspended motor carrier rates that were "original" rates, either because the rates were being filed pursuant to newly-acquired operating authority, *e.g.*, *Machinery from Salt Lake City International Transport, Inc.*, 304 I.C.C. 286 (1958), or because the carrier's only previously-filed rates had been cancelled as unjust and unreasonable, *e.g.*, *Clay from Greybull, Wyoming, to Points in Middle West*, 314 I.C.C. 705 (1961). As the Commission stated in the former case:

> No rates of the respondent were in existence on this traffic prior to the publication of the proposed rates, for the reason that the authority to transport this traffic from Salt Lake City to the destination area was newly acquired. It is thus plain that the proposed rates are initial rates. [304 I.C.C. at 286-87.][74]

Petitioners cite *In re Wharfage Charges of the Galveston Wharf Co.*, 23 I.C.C. 535, 537 (1912), a case in which the Commission merely exercised its discretion not to suspend the carrier's "original" tariffs. The decision did not hold that the Commission lacked authority, and,

[74] Other similar cases include *Foodstuffs & Agricultural Commodities, Cal. & Ariz. to W. & S.*, 329 I.C.C. 321 (1966); *Lumber-Western Auto Transports, Inc.*, 306 I.C.C. 623 (1959); *Soybean Meal and Salt from Iowa & Neb. to Iowa, Neb., and S. D.*, 318 I.C.C. 99 (1962); *Animal Feed from Miss. and Tenn. to Midwest and Southwest*, 316 I.C.C. 94 (1962); *Wine From Canandaigua, N.Y. to Fla.*, 316 I.C.C. 246, 247 (1962).

Moreover, many suspensions of initial rates have been ordered by the Commission that are not reflected in published opinions. *See, e.g.*, the Affidavit of Albert H. Fitzgerald, Chairman of the Commission's Suspension and Fourth Section Board, listing cases found during a "two-hour . . . search" covering initial rates suspended during the years 1972 through 1975. (712a-17a.) Eight such cases involved "original" rates whose suspension left the carrier temporarily with no other rates. (715a-17a.)

as the cases we have cited demonstrate, the Commission has since repeatedly suspended such "original" rates.[75]

[75] Other decisions in which petitioners claim the Commission recognized that it was without authority to suspend "original" rates (Pet. Br. 26-27) do not so hold. *Restrictions in Routing in Connection with the Ga. & Fla. R.R. Between Greenwood, S.C. and Augusta, Ga.*, 165 I.C.C. 3 (1930), *aff'd sub nom. Atlantic Coast Line R.R. v. United States*, 48 F.2d 239, 245 (W.D.S.C. 1931), *aff'd*, 284 U.S. 288 (1932), a case heavily relied on by petitioners, does not appear to involve the opening phrase of section 15(7) under which the Commission acted in the instant case, but rather the third phrase of that section. Under the first phrase the Commission has authority to suspend "any schedule stating a new individual or joint rate . . .," while under the third phrase, relating to a "new regulation or practice," the power to suspend is limited to a regulation or practice "affecting any rate, fare or charge . . . ." The cited case involved the question of suspending proposed restrictions on the applicability of certain existing joint tariffs, such restrictions plainly being regarded by the Commission as a "new regulation of practice." Finding that one of the carriers involved had never been a party to those tariffs, the Commission concluded as to that carrier that the proposed restrictions "do not relate to any regulation or practice affecting any existing rate, fare, or charge . . . within the meaning of section 15(7). . . ." 165 I.C.C. at 4. Thus, the decision does not constitute a determination as to the Commission's power to suspend a new rate under the first phrase of Section 15(7). Other cases cited by petitioners (Pet. Br. 27 n.38) are likewise not in point. For example, the language quoted from *Discontinuance of Inland or Off-Track Stations in N.Y. City*, 173 I.C.C. 727, 729-30 (1930) did not reflect a holding that the Commission's suspension authority does not apply to initial rates; on the contrary, it was the Commission's response to a carrier's argument that the suspension power does not extend to changed practices. *Maximum Rate Provision, Ocean-Rail to Southwest*, 258 I.C.C. 63 (1944) and *Salt from La. Mines to Chicago, Ill., St. Louis, Mo. and Intermediate Mainline Points*, 69 I.C.C. 312 (1922) are similarly distinguishable.

II. THE COMMISSION DID NOT PRESCRIBE RATES OR EXCEED ITS STATUTORY AUTHORITY BY ADVISING THE CARRIERS IN ADVANCE OF THE MAXIMUM RATES IT WOULD NOT SUSPEND PENDING INVESTIGATION.

Petitioners argue that even if the Commission was empowered to suspend their initial rate schedules, it exceeded its authority when it stated in the suspension order that it would allow the carriers (if they chose) to file during the suspension period specified maximum rates that it would not suspend. The Commission, they say, was limited either to suspending without more, or allowing the carriers' rates to go into effect as filed. By taking the additional step of advising the carriers in advance of interim rates that it would accept without suspension, the argument goes, the Commission transformed its action into a "'sham' suspension" and a prescription of rates without a full hearing in violation of section 15(1) of the Act. (Pet. Br. 32-42.)

This argument distorts what the Commission did. It is unquestioned that the Commission could have issued a naked suspension, with only a "statement in writing of the reasons" (section 15(7)). That would have left the carriers with the option of simply waiting out the suspension period[76] or refiling rates at a lower level in the interim—which, as shown by their action in ultimately acceding to the suggested interim rates, they almost certainly would have done. If the Commission then suspended a second round of proposed rates as still probably unreasonable, the carriers would again have been faced with the same option. At some point in the process they

[76] The carriers could of course have continued to assert the reasonableness of their proposed rates in the Commission's investigation; but it was evident that the investigation would not be completed within seven months.

would presumably have filed interim rates at a level low enough to secure Commission acceptance.[77]

What the Commission did was to try to avoid a trial-and-error process of this kind—a time-consuming exercise that, given the readiness of the pipeline for operation, would have caused injury both to the carriers and the public interest. Based on the carriers' data and the protests, the Commission had concluded that suspension was necessary if it was to carry out "its mandate to assess the reasonableness of the rates and to suspend them pending investigation if there is a question as to their legality" (*Chessie*, 412 U.S. at 514).[78] It also believed that the carriers would respond to suspension of their rates by refiling lower interim rates, rather than allowing the pipeline to remain idle for seven months. By announcing in advance the interim rates it would accept on one-day's notice without suspension, the Commission simply made it possible for the carriers to commence operations at the earliest possible time—if they decided to refile.[79] The carriers on their part always had the

[77] All such refiled rates, submitted by a carrier in an effort to obtain Commission acceptance during the suspension period, may arguably be deemed to have been "compel[led]" by the agency or not to be purely carrier-initiated (*see* Pet. Br. 36-37) in the sense that the carrier would doubtless have preferred its suspended rates. But an inevitable consequence of the suspension power is that it may force carriers to operate during the suspension period at rates other than those that they would prefer—indeed, that is the very purpose of the power.

[78] This was hardly a surprising conclusion where, as here, the carriers' proposed rates would have resulted in a composite return on equity of 46.0 percent and a composite return on valuation of 12.9 percent (*see* p. 20, *supra*).

[79] The statement-of-reasons requirement for suspension orders contained in section 15(7) serves to support the Commission's action here—not the converse, as petitioners appear to argue (Pet. Br. 33 n.49). Although the legislative history of this requirement is not entirely clear, the language is surely consistent with the view that a statement of the Commission's reasons for suspending would enable the carrier to decide whether or not to refile its rates in a form that would satisfy the agency's objections. *See* H.R. Rep. No. 923, 61st Cong., 2d Sess. 11, 84-85 (1910). *See also* Spritzer, *Uses of the Summary Power to Suspend Rates: An Examination of Federal Regulatory Agency Practices*, 120 U. Pa. L. Rev. 39,61 (1971).

option of delaying the start of TAPS operations until after expiration of the suspension period—a course that would have rendered wholly academic the interim-rate provisions in the order.

The Commission's coupling of a suspension action with informing the carriers as to the tariffs that it would accept without suspension is not unprecedented or even unusual. In *Chessie*, the Commission suspended a proposed general rate increased by the railroads but announced that it would withhold suspension on the condition that the increased revenues were spent for deferred maintenance or capital improvements—the need for which had been asserted as a justification for the increase. 426 U.S. at 503-04. The Court held that this "condition precedent to the immediate implementation of the rate increase" was "a legitimate, reasonable, and direct adjunct" to the Commission's suspension power. *Id.* at 513-14.[80] An example of similar agency action is found in *SCRAP I*, where the Commission did not suspend the proposed surcharge but imposed a number of conditions (*e.g.*, the exclusion of certain categories of freight from the surcharge, inclusion of a specified expiration date) upon its withholding of suspension. 412 U.S. at 676 & n.6. And in *Port of New York Authority* v. *United States*, 451 F.2d 783 (2d Cir. 1971), the Commission suspended proposed increases in charges for so-called lighterage service, but allowed the carrier to file without

[80] The Court also pointed out that the railroads were "not required" to accept this condition, and "had the option to continue to insist on an unconditional increase . . ." and to assert the reasonableness of the suspended tariffs in the Commission's investigation. 426 U.S. at 515.

suspension increased charges "not to exceed 50%" of the increase initially proposed (*id.* at 785-86).[81]

Here, also, the Commission suspended the rates originally filed and informed the carriers of the lower rates it would accept during the suspension period. Plainly, such action does not constitute the prescription of rates without a "full hearing" (section 15(1)).[82] The just and reasonable rates for TAPS service will be prescribed in the investigation instituted by the Commission and currently in progress before FERC. The interim rates, as the Commission said (628a), are not "intended to have permanent effect"; they are simply rates that the agency allowed the carriers to file without suspension during the period of suspension of their originally-filed rates. Nor are the carriers being denied a full hearing. They are receiving an exhaustive evidentiary hearing in the current investigation.

It is true that the Commission made a detailed computation of the interim rates, obtaining the same kind of economic data and applying the same type of ratemaking standards that it would use in a formal investigation. But it should hardly be faulted for doing so—instead of, for example, suggesting a flat percentage reduction or saying nothing and letting the carriers make repeated filings on a trial-and-error basis. By means of its care-

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[81] The Commission's action was challenged not by the carrier but by a user of the service. The court dismissed for lack of jurisdiction to review the agency's suspension action.

[82] *See Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va. 1935) (three-judge court), where the Commission held extensive hearings on rate increases proposed by the railroads and then issued an order rejecting the proposal "as a whole" but stating that certain specified emergency increases would be "authorized" on a "permissive" basis (*id.* at 491). The court found that the Commission "*prescribed* no particular rates. It merely permitted the carriers to file new rates without suspension." *Id.* at 494 (emphasis in original).

ful calculations, based on the available data, the Commission sought not only to satisfy itself that the carriers' proposed rates were probably unlawful and thus should be suspended, but also to assure that the suggested interim rates would provide the carriers an adequate return during the suspension period.[83] This was responsible, not arbitrary or unlawful, agency action.

Moss v. *CAB*, 430 F.2d 891 (D.C. Cir. 1970), upon which petitioners rely, was a far different case. In *Moss* the rate formula suggested by the agency as a condition of withholding suspension was adopted "through the cooperation of the carriers and the Board" in *ex parte* meetings (*id.* at 894, 902); this formula required "major changes in rate-making practices," not merely changes in rate levels (*id.* at 899); and, most importantly, the carriers withdrew their originally-filed rates, thereby "abort-[ing]" both the investigation instituted by the Board in its suspension order and the judicial review that would follow such an investigation (*id.* at 897 n.28, 900).[84] Here, by contrast, the investigation has not been aborted, and there will be full opportunity for judicial review of the agency's final decision. The Commission has not "fence[d] the public out" of the ratemaking process (*id.* at 893) or cooperated behind-the-scenes with the carriers; nor did its suggested rates involve a major change in

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[83] As discussed in the Statement, (pp. 19-20, *supra*), the Commission utilized the carriers' own investment and expense data in computing interim rates, and the sole adjustment it made in its existing ratemaking standards for crude oil pipelines was in favor of the carriers. In essence, the Commission rejected only the carriers' claim that they should be compensated twice for the interest expense on a $9 billion pipeline that is 85 percent debt-financed.

[84] As explained by the District of Columbia Circuit in 1975, *Moss* "stressed that the CAB's rate formula was the product of behind-the-scenes bartering between the agency and the carriers, and that none of the tariffs filed consistent with the CAB's formula were subject to investigation after they became effective." *Consolidated Edison Co. of N.Y., Inc.* v. *FPC*, 512 F.2d 1332, 1342 (D.C. Cir. 1975).

ratemaking practices. In other words, there is no "sham" element whatever about the Commission's suspension here: the interim rates it suggested are truly interim, a full investigation is going forward, and the rates prescribed in that investigation will be subject to judicial review.

III. THE COMMISSION HAD THE AUTHORITY TO CONDITION ITS ACCEPTANCE OF THE INTERIM RATES WITHOUT SUSPENSION UPON THE CARRIERS' AGREEMENT TO REFUND ANY CHARGES IN EXCESS OF THE RATES DETERMINED IN THE INVESTIGATION.

Petitioners challenge the Commission's authority to require, as a condition of its acceptance of the interim rates without suspension, that the carriers agree to keep account and to refund any excess of the amounts collected, both under the interim rates and the suspended rates when they become effective, over the rates ultimately determined in the formal investigation. (Pet. Br. 42-46. *See* 636a, 638a.)[85] As the court below concluded, however, imposition of this condition, "like the power to suggest the interim rates themselves," was a "valid corollary" of the agency's suspension power. (760a-61a.)

In *Chessie* this Court upheld the Commission's authority to impose "condition[s] precedent" to its acceptance of rate filings without suspension that are "directly related" to its "mandate" under the suspension power. 426 U.S. at 513-14. Here, the Commission found that "even the lower interim rate levels may prove upon investigation to exceed reasonable levels," (636a), and, *a fortiori*, that is true of the rates initially filed by the carriers, which

[85] We do not understand petitioners to challenge the Commission's keep-account requirement independently of the refund condition. With respect to the former requirement, see sections 20(5) and (7) of the Act, 49 U.S.C. §§ 20(5), (7).

would become effective after expiration of the suspension period. A "condition precedent" that the carriers agree to refund charges collected by them in excess of the levels determined to be just and reasonable after a formal investigation is, as in *Chessie*, "directly related" to the Commission's "mandate" to assess the reasonableness of new rates and to suspend rates of doubtful legality.[86] *Id.* at 514. If the carriers were unwilling to accept this condition, they "had the option," as *Chessie* points out, not to file interim rates on the Commission's terms. *Id.* at 515.

Petitioners' contrary argument is that the keep-account and refund provision in section 15(7) applies only in the case of a "proposed increased rate" and that the Commission should not be allowed to impose conditions that "plainly conflict" (Pet. Br. 44) with the intent of Congress. But it is not accurate to say that Congress, by expressly authorizing a refund requirement where a suspended increase goes into effect before a formal investigation can be completed, intended to deny the Commission discretion to impose a similar requirement with respect to an initial or decreased rate as a condition to withholding suspension. The legislative history of the keep-account and refund provision does not support any such preclusive intent by Congress.

This provision was adopted as part of the Transportation Act of 1920, 41 Stat. 456, 486, which also reduced the suspension period under section 15(7) from ten to five months. The House bill provided only a 120-day suspension period, and a keep-account and refund provision was included in this context. *See Arrow*, 372 U.S. at 665-

[86] The Commission implied in its order that without a refund condition it would not have accepted the interim rates—which were, after all, premised on the carriers' own "basic data" and computed using an above-standard rate of return on valuation (*see* 629a-30a).

66.[87] Its purpose is made clear in testimony of ICC Commissioner Clark before the House Committee:

> MR. SIMS [a Committee member]. Will the Commission have sufficient time during the period authorized for suspension, as you have indicated—that is, will the Commission have the time required to give proper consideration to the rates prior to that time?
>
> MR. CLARK. Well, we hope so. We can not predict with certainty, because we can not know what the conditions will be. We have undertaken to protect the shipper in the event of our inability to conclude the proceeding within 120 days by conferring upon the commission authority to require the carriers to keep an accounting of all of the traffic that moves under those rates, so that at the end of the investigation the commission can order the carriers to pay back to the ones from whom or in whose behalf they received payment what they have received in excess of what the commission finds would have been reasonable.[88]

Although the Senate bill did not include a refund provision, the House language was retained in conference and enacted. The Conference Report described the provision as requiring "that as to freight rates the carrier should keep a record in all cases where the commission had not concluded such hearing, and, if the commission finally found the rates too high, the carrier was required to make refunds to the shippers affected." [89]

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[87] *See also* H.R. Rep. No. 456, 66th Cong., 1st Sess. 29-30 (1919); 58 Cong. Rec. 8317 (1919), remarks of Rep. Esch.

[88] Hearings on H.R. 4378 Before the House Comm. on Interstate and Foreign Commerce, 66th Cong., 2d Sess. 90-91 (1919).

[89] H.R. Rep. No. 650, 66th Cong., 2d Sess. 6 (1920). The full text of the relevant paragraph is as follows:

> The House bill in section 417 authorized the commission to suspend rates for 120 days after their filing, at the end of which time they were to go into effect whether or not the commission had concluded its hearing, but that as to freight rates the carrier should keep a record in all cases where the commission had not concluded such hearing, and, if the commission finally found the rates too high, the carrier was required to make refunds to the shippers affected. The Senate amendment provided for a suspension for 120 days, and, if the hearing was not then concluded, for a 30 days' further extension, after which time the rates were to go into effect whether or not the hearing was concluded, and without any duty on the carrier to make refunds if the rate was later found to be excessive. The conference bill retains the House provision, but inserts the 30 days' further suspension provided for in the Senate amendment.

It would thus distort legislative intent to say that, in enacting this provision designed to protect shippers against excessive rates, Congress intended also—without saying so—to preclude the Commission from imposing a refund requirement as a condition to allowing carriers to file interim rates without suspension. The statutory refund language does not even apply to interim rates of this kind—increased or otherwise—but only to suspended rates upon expiration of the suspension period. And even in the case of suspended rates, there is no reason to infer that Congress intended to prohibit the Commission from requiring refunds as a condition of withholding suspension.

In an analogous situation, this Court upheld the authority of the Federal Power Commission to impose initial-rate or refund conditions in the exercise of its licensing power, even where it lacked the authority to do so directly under its ratemaking authority. *See Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959); *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9 (1968); *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223 (1965). Here also, whatever the Commission's authority to impose a refund requirement directly, it could nonetheless do so as a condition of withholding suspension.[90]

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[90] *See Admiral-Merchants Motor Freight, Inc.* v. *United States*, 321 F. Supp. 353 (D. Colo.) (three-judge court), *aff'd*, 404 U.S. 802

Petitioners further argue that if the agency should determine in its formal investigation that the just and reasonable rates for TAPS service are below the carriers' initial rates or the interim rates, the refund condition would "deprive" them of an opportunity to litigate in a reparations proceeding whether those rates were unreasonable during the specific past periods when they were collected. (Pet. Br. 44-46.) But there is no reason to assume, as petitioners do, that this issue cannot be litigated in the pending investigation, in connection with the computation of refunds by the agency. The statutory language (albeit not in terms applicable here) provides for refunds of those portions of a rate increase which, under the Commission's decision, "shall be found not justified" (section 15(7)). That language surely would not foreclose consideration of "special circumstances" (Pet. Br. 46) in determining the amount of any refund.[91] The refund condition in this case was broadly characterized by the Commission as providing for refunds of amounts "that may ultimately be established as excessive." (636a.) And the Commission's first ordering paragraph states that its investigation was instituted "with a view to making such findings and orders in the premises as the facts and circumstances shall warrant." (637a.)[92]

(1971) (refund requirement imposed as a condition to grant of a procedural extension of time upheld).

[91] We do not, of course, concede that the specific allegations made by petitioners, even if proved, would warrant a reduction in the amount of any refund. That is to be decided before the agency.

[92] It is noteworthy that the Federal Power Commission, which administers statutes containing refund provisions similar to that in section 15(7), *see* 15 U.S.C. § 717c(e) and 16 U.S.C. § 824d(e), has fashioned refund orders in the light of public interest or equitable considerations. *See, e.g., Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 299, 317-18 (1974) (refund obligation can be "worked off" by commitment of additional gas reserves to the interstate market).

If petitioners' argument is that they are entitled to a reparations forum as such, that is simply not so. The section 15(7) refund provision, applicable in the case of suspended rate increases, serves to obviate reparations litigation, and petitioners do not suggest it is unconstitutional. Here, although the statutory provision is not in terms applicable, the Commission concluded that shippers and those (such as the Alaska parties) who stand in their shoes should not be forced to undertake additional litigation to establish a reparations claim and that a refund requirement tied to the just and reasonable rate levels determined in the investigation is appropriate. This conclusion, as we have shown, could properly be implemented by a condition to withholding suspension of the interim rates.[93]

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[93] While they do not say so here, the carriers' insistence upon reparations procedures may reflect their intention to argue below that the Alaska parties lack standing or cognizable injury to obtain reparations. (Section 8 of the Act, 49 U.S.C. § 8.) *See, e.g., Southern Pac. Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918); *Louisville & Nashville R.R. Co.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); and *cf. Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977). In other words, if the Commission's refund condition is struck down here, the carriers may, by asserting a lack-of-standing defense to a reparations claim, seek to avoid *any* liability to the Alaska parties stemming from excessive rates charged during the pendency of the investigation—no matter how great their actual monetary loss. While we have no doubt that the Alaska parties would have the requisite standing and injury to obtain reparations, *see, e.g., Gabbert* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 93 F.2d 562, 563 (5th Cir. 1937); *see also Arrow*, 372 U.S. at 669; *Illinois Brick Co.* v. *Illinois*, 431 U.S. at 736, the issue appears not to have been decided by either the courts or the agency on the specific facts presented here. On the other hand, there cannot be the slightest question as to the Alaska parties' right to participate in any refund to the oil producers, which would, in effect, retroactively increase the wellhead value during the period in question.

IV. THE COMMISSION'S ORDER DID NOT CONTRAVENE ANY RIGHTS OF THE CARRIERS UNDER THE FIFTH AMENDMENT.

In the proceedings below several petitioners argued that the Commission's suspension order violated their rights under the due process and just compensation clauses of the Fifth Amendment. (*E.g.*, 306a-11a, 617a-18a. *See* 761a.) Although this line of argument is not spelled out in petitioners' brief in this Court, it seems not to have been abandoned (*see* Pet. Br. 2, 3).[94] In any case, the argument need not detain the Court.

With respect to any claim that the carriers were denied due process when the Commission determined without a prior evidentiary hearing the interim rates that it would allow them to file (*see* 306a-11a, 617a), we have already shown that this action did not amount to prescribing rates and that a prior "full hearing" was thus not required (*see* pp. 55-57, *supra*). Petitioners are receiving a full hearing in the formal investigation, in which rates *will* be prescribed. Moreover, the carriers were afforded extraordinarily full procedures at the suspension stage.[95] As discussed in the Statement (pp. 10-21, *supra*), a large volume of economic data was received from both the carriers and protestants; voluminous written argument was submitted; an opportunity to present oral argument to the full Commission was pro-

[94] Petitioners thus state that this case "present[s] issues arising under the Fifth Amendment" and quote the due process and just compensation clauses (Pet. Br. 3).

[95] Section 15(7) provides that the Commission may "enter upon" its investigation "at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice" and that it may suspend a proposed rate schedule merely by "filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension."

vided; and the suggested interim rates were carefully computed, essentially on the basis of data submitted by the carriers.

Nor is there any basis for a contention that the interim rates are confiscatory (*see* 618a, 761a).[96] Those rates, as discussed above, utilized the carriers' own "basic data" and assumed the accuracy of the investment and expenses claimed by them (*see* pp. 19-21, *supra*). Further, the Commission allowed a substantially higher rate of return on valuation (*i.e.*, 10% instead of 8%) than it had utilized in prior cases involving crude oil pipelines. And the carriers' composite return on equity under the interim rates was calculated by the Commission at 23 percent. (635a.) In short, the suggested interim rates, far from being confiscatory, are likely to turn out to be (if anything) on the high side—and that, of course, is why the Commission insisted on a refund condition applicable to those rates.

[96] *See Permian Basin Area Rate Cases*, 390 U.S. 747, 768-74 (1968).

CONCLUSION

For the foregoing reasons, the Commission was empowered to issue the order under review. The judgment of the court of appeals, dismissing the petitions for review, should be affirmed.

Respectfully submitted,

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February, 1978

STATUTORY APPENDIX

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Interstate Commerce Act (49 U.S.C. §§ 1 et seq.)

PART I

Regulation in general; car service; alteration of line

Sec. 1. (1) That the provisions of this part shall apply to common carriers engaged in—

* * * *

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water—Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; June 29, 1906, c. 3591, § 1, 34 Stat. 584; June 18, 1910, c. 309, § 7, 36 Stat. 544; Feb. 28, 1920, c. 91, § 400, 41 Stat. 474; June 19, 1934, c. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; [49 U.S.C. § 1 (1) (b)].

* * * *

(3) (a) The term "common carrier" as used in this part shall include all pipe-line companies; . . . Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; June 29, 1906, c. 3591, § 1, 34 Stat. 584; June 18, 1910, c. 309, § 7, 36 Stat. 544; Feb. 28, 1920, c. 91, § 400, 41 Stat. 474; June 19, 1934, c. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 2(a), (b), 54 Stat. 899; [49 U.S.C. § 1(3) (a)].

* * * *

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge

for such service or any part thereof is prohibited and declared to be unlawful. The provisions of this subdivision shall not apply to common carriers by railroad subject to this part. Feb. 4, 1887, c. 104, pt. I, § 1, 24 Stat. 379; June 29, 1906, c. 3591, § 1, 34 Stat. 584; June 18, 1910, c. 309, § 7, 36 Stat. 544; Feb. 28, 1920, c. 91, § 400, 41 Stat. 474; June 19, 1934, c. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 2(d), 54 Stat. 899; Aug. 2, 1949, c. 379, § 1, 63 Stat. 485; Feb. 5, 1976, Pub. L. 94-210, Title II, § 202(a), (b), 90 Stat. 34, 35; [49 U.S.C. § 1(5)(a)].

* * * *

Liability in damages to persons injured by violation of law

Sec. 8. In case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. Feb. 4, 1887, c. 104, Pt. I, § 8, 24 Stat. 382; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; [49 U.S.C. § 8].

* * * *

Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

* * * *

Sec. 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part,

or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property, as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed. Feb. 4, 1887, c. 104, Pt. I, § 15, 24 Stat. 384; June 29, 1906, c. 3591, § 4, 34 Stat. 589; June 18, 1910, c. 309, § 12, 36 Stat. 551; Feb. 28, 1920, c. 91, § 418, 41 Stat. 484; June 19, 1934, c. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 10(a), 54 Stat. 911; [49 U.S.C. § 15(1)].

* * * *

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf

such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. This paragraph shall not apply to common carriers by railroad subject to this chapter. Feb. 4, 1887, c. 104, Pt. I, § 15, 24 Stat. 384; June 18, 1910, c. 309, § 12, 36 Stat. 551; Feb. 28, 1920, c. 91, § 418, 41 Stat. 484; Mar. 4, 1927, c. 510, § 2, 44 Stat. 1447; Sept. 18, 1940, c. 722, Title I, § 10(c), 54 Stat. 912; Feb. 5, 1976, Pub. L. 94-210, Title II, § 202(e)(1), 90 Stat. 36; [49 U.S.C. § 15(7)].

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PART II

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Rates, Fares, and Charges of Common Carriers by Motor Vehicle

Sec. 216.

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(g) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a common carrier or carriers by motor vehicle, or by any such carrier or carriers in conjunction with a common carrier or carriers by railroad and/or express, and/or water in interstate or foreign commerce, or any rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service

thereunder, the Commission is hereby authorized and empowered upon complaint of any interested party or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, or charge, or such rule, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, or charge, or classification, rule, regulation, or practice, shall go into effect at the end of such period: *Provided*, That this paragraph shall not apply to any initial schedule or schedules filed on or before July 31, 1938, by any such carrier in bona fide operation on October 1, 1935. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable. Feb. 4, 1887, c. 104, Pt. II, § 216, as added Aug. 9, 1935, c. 498, 49 Stat. 558, and amended June 29, 1938, c. 811, § 16, 52 Stat. 1240; Sept. 18, 1940, c. 722, Title I, § 22(b-d), 54 Stat. 924; Aug. 24, 1962, Pub. L. 87-595, § 1, 76 Stat. 397; [49 U.S.C. § 316(g)].

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PART III

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Commission's Authority over Rates, and So Forth

Sec. 307.

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(g) Whenever there shall be filed with the Commission any schedule (except a schedule referred to in section 322) stating a new rate, fare, charge, classification, regulation, or practice for the interstate or foreign transportation of passengers or property by a common carrier or carriers by water, the Commission may upon protest of interested parties or upon its own initiative at once, and, if it so orders, without answer or other formal pleading by such carrier or carriers, but upon reasonable notice, enter upon an investigation concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice, and pending such hearing and the decision thereon, the Commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto, as would be proper in a proceeding instituted after such rate, fare, charge, classification, regulation, or practice had become effective. If the proceeding shall not have been concluded and an order made within the period of suspension, the proposed rate, fare, charge, classification, regulation, or practice shall go into

effect at the end of such period: *Provided, however*, That this subsection shall not apply to any initial schedule filed prior to October 1, 1941, by any such carrier (other than a carrier subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended, or the Shipping Act, 1916, as amended) insofar as such schedule names rates on traffic, or for services connected therewith, as to which such carrier was in bona fide operation on January 1, 1940. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable. Feb. 4, 1887, c. 104, Pt. III, § 307 as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 937; [49 U.S.C. § 907(g)].

* * * *

PART IV

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Commission's Authority over rates and practices

Sec. 406.

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(e) Whenever there shall be filed with the Commission, under this part, any tariff stating a new rate, charge, classification, regulation, or practice, the Commission may upon complaint or upon its own initiative at once, and, if it so orders, without answer or other formal pleading, but upon reasonable notice, enter upon an investigation concerning the lawfulness of such rate, charge, classification, regulation, or practice, and, pending such hearing and the decision thereon, the Commission, by filing with such tariff and delivering to the freight forwarder affected thereby, a statement in writing of its reasons for

such suspension, may from time to time suspend the operation of such tariff and defer the use of such rate, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after such rate, charge, classification, regulation, or practice had become effective. If the proceeding shall not have been concluded and an order made within the period of suspension, the proposed rate, charge, classification, regulation, or practice shall go into effect at the end of such period: *Provided, however*, That, subject to section 405 (b), this subsection shall not apply to any initial tariff filed prior to the expiration of ninety days after May 16, 1942. At any hearing involving a change in a rate, charge, or classification, or in a rule, regulation, or practice, the burden of proof shall be upon the freight forwarder to show that the proposed changed rate, charge, classification, rule, regulation or practice is just and reasonable. Feb. 4, 1887, c. 104, Pt. IV, § 406, as added May 16, 1942, c. 318, § 1, 56 Stat. 288; [49 U.S.C. § 1006 (e)].

* * * *